88-764

Supreme Court, U.S.
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No. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

SAMUEL JONES, JR.,

Petitioner,

v.

PREUIT & MAULDIN, a partnership; and E.F. MAULDIN, individually and as Executor of the Estate of Leonard Preuit, deceased; and PREUIT & MAULDIN

Respondents.

Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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APPENDIX A

Samuel JONES, Jr., Plaintiff-Appellant

v.

PREUIT & MAULDIN, et al., Defendants-Appellees.

No. 84-7482

United States Court of Appeals Eleventh Circuit.

June 21, 1985.

On February 24, 1984, Samuel Jones filed suit against Preuit & Mauldin, a partnership engaged in the business of servicing equipment. The complaint alleged that on April 8, 1982, the defendants, acting pursuant to ALA. CODE § 35-11-111 (1975), obtained writs of attachment for three International Harvester cotton pickers belonging to Jones. The sheriff of Lawrence County seized the machines on April 18, 1982, without no-

tice to Jones or a preseizure hearing. The attachment also took place prior to judgment in the defendants' underlying state court actions for a debt for repairs to the pickers. Jones claims that such prejudgment attachment procedures deprived him of due process of law in contravention of Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), and its progeny. Jones brought this claim under 42 U.S.C.A. § 1983 (West 1981). The defendants moved for dismissal for failure to state a claim and for failure to bring the suit within the statutory time limit. The district court, 586 F.Supp. 1563, granted the motion and rejected the plaintiff's claim that the most relevant state statute was the three-year statute governing suits on attachment bonds, ALA. CODE § 6-6-148

(1975). Instead, the court applied the one-year "catchall" statute of limitations, covering "actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section." ALA. CODE § 6-2-39(a)(5) (1975). Since the plaintiff had filed suit 22 months after the attachment, the court dismissed the case.

I. STATEWIDE CHARACTERIZATION OF SECTION 1983 CLAIMS

Because Section 1983 does not contain a specific statute of limitations, U.S.C.A. § 1988 (West 1981) directs courts to select and apply the most appropriate or analogous state statute of limitations. Burnett v. Grattan, ____ U.S. ____, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984); Board of Regents v. Tomanio, 446

U.S. 478, 483, 100 S.Ct. 1790, 1794, 64 L.Ed.2d 440 (1980); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462, 95 S.Ct. 1716, 1721, 44 L.Ed.2d 295 (1975). So long as that analogous state provision is not inconsistent with the policies underlying the federal cause of action, Johnson, 421 U.S. at 465, 95 S.Ct. 1722; Ehlers v. City of Decatur, 614 F.2d 54 (5th Cir. 1980), a federal court may treat the state statute of limitations as controlling.

In this Circuit the choice of an appropriate state statute has proceeded in two steps. First, the court determines the "essential nature" of the claim. Federal law determines the essential nature of the claim, yet federal law resolves questions largely by reference to state law. Shaw v. McCorkle, 537 F.2d

decides which statute of limitations a state court would apply if faced with a claim of the same type or class as the Section 1983 claim. Beard v. Stephens, 372 F.2d 685 (5th Cir. 1967).

The Supreme Court's recent decision in Wilson v. Garcia, ____ U.S. ____, 105 S.Ct. 1983, 85 L.Ed.2d 254 (1985), relieves this court of the difficult task of characterizing the essential nature of Section 1983 claims in varying contexts.[1/] The Court in Wilson held first that the characterization of a Section 1983 claim for statute of limitations purposes is a question of federal law. Next, the court held that a simple and uniform characterization of all Section 1983 claims best fits the statute's remedial purpose because a uniform characterization prevents the "uncertainty

uniform characterization prevents the "uncertainty and time-consuming litigation" caused when court predicate their choice of the correct statute of limitations "on an analysis of the particular facts of each claim." 105 S.Ct. at 1945. Hence, federal courts must "select, in each State, the one most appropriate statute of limitations for all § 1983 claims." Id. at 1947.

Finally, the Wilson court held that federal courts hearing claims under Section 1983 should borrow the state limitations statute governing "personal injury" claims rather than a "catchall" limitations period, a limitations statute for damage to property or breach of contract, or a limitations statute governing suits against public officials. The task facing this court, therefore, is to

choose the one Alabama limitations statute governing claims for recovery of damages for "personal injury" that federal courts should borrow for purposes of 42 U.S.C. § 1983 (West 1981).[2/]

II. ESSENTIAL NATURE OF SECTION 1983 PERSONAL INJURY CLAIMS

Two Alabama statutes govern the limitations periods for bringing personal injury suits. The six-year statute, ALA. CODE § 6-2-34(1) (1975), governs all actions "for any trespass to person or liberty, such as false imprisonment or assault and battery." The one-year statute, ALA. CODE § 6-2-39 (a)(5) (1975), applies to actions "for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section."[3/] The choice between these two statutes depends upon

whether the wrongful act constitutes a trespass or a trespass on the case: Section 6-2-34(1) governs trespass actions while Section 6-2-39(a)(5) governs trespass on the case. C.O. Osborn Contracting Co. v. Alabama Gas Corp., 273 Ala. 6, 135 So.2d 166 (1961); Smith and Gaston Funeral Directors v. Dean, 262 Ala. 600, 80 So.2d 227 (1976); Beard v. Stephensm 372 F.2d 685 (5th Cir. 1967). The choice of the proper and analogous Alabama statute for purposes of Section 1983 claims will depend, then, on whether the "personal injury" that is the essential nature of all Section 1983 claims is more akin to trespass or trespass on the case. This calls for some elaboration on the "essential nature" of Section 1983 claims and is therefore a question of federal law, but one that may be informed by the

state law definition of trespass and trespass on the case.

Under Alabama law, trespass involves an intentional act done with force and immediately injurious to the person of another or to property in his or her possession. Trespass on the case would lie when the wrongful act causes harm only indirectly and without an intentional act of force.[4/] W.T. Ratliff Co., Inc. v. Henley, 405 So.2d 141 (Ala. 1981). Trespass requires intentional or "wanton" causation of injury as opposed to mere negligence, City of Fairhope v. Raddcliffe, 49 Ala. App. 224, 263 So.2d 682 (1972); Cochran v. Hasty, 378 So.2d 1131 (Ala. Civ. App. 1979), or an omission of a duty to act. Sasser v. Dixon, 290 Ala. 17, 273 So.2d 182 (1973). Liability based on respondent superior is

framed as trespass on the case. C.O. Osborn Construction Co. v. Alabama Gas Corp., 273 Ala. 6, 135 So.2d 166 (1961).

The characterization of Section 1983 claims given by the Supreme Court in Wilson resembles an action in trespass on the case. The Court analyzed the legislative history of the Reconstruction Civil Rights Acts and noted that the specific historical catalyst for those statutes was the "campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights." 105 S.Ct. at 1947. See generally A. TRELEASE, WHITE TERROR 261-73 (1971) (describing activities of Ku Klux Klan in northern Alabama). The Congress had been especially concerned with murder, whippings, lynchings and banishings;

the statutory remedy for violation of constitutional rights was meant to restore peace and justice. 105 S.Ct. 1947; see also Briscoe v. LaHue, 460 U.S. 325, 336-40, 103 S.Ct. 1108, 1116-18, 75 L.Ed.2d 96 (1982). These acts of violence are all "direct" and intentional injuries to the person that would sound in trespass. Cf. Beard v. Stephens, 372 F.2d 685 5th Cir. 1967); Holcombe v. Whitaker, 294 Ala. 430, 318 So.2d 289 (1975); Donald v. Swann, 24 Ala.App. 463, 137 So. 17, cert. denied, 223 Ala. 293, 137 So. 181 (1931).

On the other hand, the remedy ultimately chosen by the 42d Congress in Section 1983 did not address only those wrongs that most concerned the legislators. Klan activities epitomized a general adequacy and inequality in state law

enforcement. Monroe v. Pape, 365 U.S. 167, 172-83 81 S.Ct. 473, 476-82, 5 L.Ed.2d 492 (1961). The "unifying theme" of the statutes, equality of all persons under the law, constituted a goal much broader than the prevention of physical violence. Wilson, 105 S.Ct. at 1947. Nothing in the language or legislative history limits Section 1983 solely to the intentional deprivations of constitutional rights. Parratt v. Taylor, 451 U.S. 527, 534, 1901 S.Ct. 1908, 1912, 68 L.Ed.2d 420 (1981); Baker v. McColan, 443 U.S. 137, 139-40, 99 S.Ct. 2689, 2692-93, 61 L.Ed.2d 433 (1979).

Obviously, then, some Section 1983 claims will sound in trespass and other in trespass on the case. Some will involve direct injuries, Shillingford v. Holmes, 634 F.2d 263 (5th Cir. Unit A

1981) (unjustified assault on citizen by police officer), and others will involve indirect injuries. Glover v. Alabama Department of Corrections, 734 F.2d 691 (11th Cir. 1984) (prison official induces several prisoners to assault another prisoner), or injuries caused without the use of force, Espanola Way Corp. v. Meyerson, 690 F.2d 827 (11th Cir. 1982) (city commissioners' alleged harassment of business through excessive regulation), cert. denied, 460 U.S. 1039, 103 S.Ct. 1431, 75 L.Ed.2d 791 (1983). As the Supreme Court has stated, "[a] catalog of . . . constitutional claims that have been alleged under § 1983 would encompass numerous and diverse topics and subtopics." Wilson, 105 S.Ct. at 1947. The Section 1983 remedy ecompasses a broad range of tort analogies, Id. at 1947.

The "essential nature" of a Section 1983 personal injury claim cannot, therefore, be determined simply by asking for which of the state law causes of action personal injury, such as trespass or trespass on the case, could also be brought under the federal statute. That question yields too many answers. The appropriate characterization of Section 1983 personal injury claims must be determined by searching the legislative history of the statute and isolating the particular type of wrong that was most paradigmatic, the one category of wrongs that the legislators intended first and foremost to address. The Supreme Court in Wilson made such a determination in order to conclude that Section 1983 claims are personal injury claims rather than general statutory claims falling

within a catchall limitations statute. The scarcity of statutory claims in 1871 and the primacy of constitutional claims under Section 1983 prevented the use of state catchall statute. Constitutional claims are only a subset of the claims falling within the Section 1983 remedy, but they were the most significant subset in the eyes of the 42d Congress. Wilson, 105 S.Ct. at 1947.

Similarly, personal injuries sounding in trespass make up the most significant subset of claims within Section 1983. The paradigmatic personal injuries covered by the statute, those that motivated the Congress to take action, were acts of international and direct violence on the part of the Ku Klux Klan. The 1871 Act was enacted after President Grant described for Congress the break-

down of law and order in the Southern States. Conditions "rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous" led the President to ask for legislation. The President's request stated that proof of the conditions in the South had been presented to the Senate. S.REP. NO. 1, 42d Congress, 1st Sess. (1871). That Senate Report, relied upon extensively by the Congress, see CONG. GLOBE. 42d Congress, 1st Sess. App. 166-67 (1871) (remarks of Rep. Williams), detailed murders, whippings and other acts of violence on the part of the Klan. Senator Sherman's original resolution calling for the passage of a bill was motivated by the activities of armed men who had "by force, terror and violence subverted all civil autho-

rity,. . . overthrowing the safety of persons and property and all those rights which are the primary basis and object of all civil government." The bill would "punish such organized violence." Id. at 152.

The debates focused on arson, robbery, whippings, shootings, murders, and other forms of violence and intimidation perpetrated by the Klan. Briscoe v. LaHue, 460 U.S. 325, 337, 103 S.Ct. 1108, 1117, 75 L.Ed.2d 96 (1982). These primary wrongs were only compounded by the lack of effective state law remedies. When the legislators complained that the state authorities had been unable or unwilling to protect the constitutional rights of individuals, see Patsy v. Board of Regents of Florida, 457 U.S. 496, 505, 102 S.Ct. 2557, 2562, 73 L.Ed.2d 172

(1982), they usually meant that a black citizen had no recourse against illegal acts of violance or trespass. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 374 (1871) (remarks of Rep. Lowe) ("While murder is stalking abroad in disguise, while whippings and lynchings and banishings have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective."); id. at 156 (remarks of Sen. Sherman) (Klansmen do not "think it any crime to kill a negro or rob a Yankee"); id. 199-200 (remarks of Sen. Nye); id. at 320-21 (remarks of Rep. Stoughton); id. at 441-444 (remarks of Rep. Butler).

The extensive legislative history demonstrates that members of the 42d Con-

gress considered direct acts of violence against black citizens to be paradigmatic wrong addressed by the new state. Hence, the essential nature of a Section 1983 claim fits the description of trespass under Alabama law. We conclude on the basis of Congressional intent and the Supreme Court's opinion in Wilson v. Garcia, supra, that a Section 1983 claim should be characterized as a personal injury action along the lines of a trespass. Therefore, federal courts in Alabama will borrow the length of the limitations period as found in ALA. CODE § 6-2-34(1) (1975), together with the proper state law treatment of related questions of tolling and application. That statute contains a six-year limitation period. Jones filed his suit before this limitation period had elapsed and

the district court improperly dismissed the case.[5/]

REVERSED.

* * *

Samuel JONES, Jr., Plaintiff

v.

PREUIT & MAULDIN, etc., et al., Defendants.

Civ. A. No. 84-AR-5131-NW.

United States District Court,

N.D. Alabama,

Northwestern Division.

June 15, 1984.

MEMORANDUM OPINION

ACKER, District Judge.

This action was brought by plaintiff, Samuel Jones, Jr. (Jones), pursuant to 42 U.S.C. § 1983 charging that certain of plaintiff's property was wrongfully seized under color of state law by constitutional violation inherent in the at-

tachment procedure. The portion of the complaint here pertinent alleges that the "procedure did not comply with the requirements of the Fourteenth Amendment concerning deprivations of property without due process of law in relation to prejudgment seizures of property." The alleged constitutional deprivation occurred on April 8, 1982. Jones filed his complaint on February 24, 1984. Defendants have filed a motion to dismiss the complaint, asserting as an absolute defense the statute of limitations of one year. If defendants are correct and if the applicable statute of limitations is one year, then plaintiff is clearly barred on the face of his complaint. If, however, the applicble statute of limitations is three years, as Jones contends, then his action may proceed to a hearing on the merits.

It no longer requires citation of authority for hte proposition that because § 1983 itself contains no statute of limitations, the federal courts look to and apply the state statute of limitations most nearly analogous to the particular § 1983 claim being brought. Howeverr, as was eloquently elucidated by Hon. Robert Propst in Fomby v. City of Calera, 575 F.Supp. 221, 223 (N.D. Ala. 1983), "[t]he choice of a limitations period for a federal cause of action is itself a question of federal law". (emphasis added). This Court thoroughly agrees with Judge Propst. Judge Propst's persuasive rationale is reminiscent of one of the opening scenes in Gone With the Wind, which contains the following dialogue taking place among field hands at the close of the day, with

Tara in the distant background. The scene in the screen play is called "Quitting Time at the Plantation". Most serious moviegoers will remember.

Scene

> Cotton field, with field hands at work plowing furrows. The bell at Tara is heard faintly. One of the hands, Elijah stops.
>
> Elijah: Quittin' Time!
>
> Another huge black man, known as Big Sam, turns on Elijah sharply:
>
> Big Sam: Who said?
>
> Elijah: I sez.
>
> Big Sam: You can't sez. I'se do foahman. I'se de one dat sez when it's time to quit. [He calls out loudly to the other hands.] QUITTIN' TIME!

To paraphrase Big Sam inversely and to reiterate Judge Propst, it is the federal court which says when it is "STARTIN' TIME" under § 1983. Although the federal court must look to the state law for the

appropriate statute of limitations, it is not the state which "sez" what particular statute of limitations the federal court must apply. The state simply furnishes its various statutes of limitations for perusal and selection by the federal court in the context of the particular § 1983 complaint.

Jones here urges that the Alabama statute of limitations more nearly analogous to his situation is Ala. Code § 6-6-148 (1975), which reads as follows:

> At any time within three years of the suing out of the attachment, before or after the action is determined, the defendant in attachment may commence an action on the attachment bond and may recover such damages as he has actually sustained if the attachment was wrongfully sued out and, if sued out of maliciously as well as wrongfully, the jury may, in addition, give vindictive damages.

On the other hand, defendants assert that the here appropriate statute of limitations is Ala. Code § 6-2-39(a)(5) (1975), which reads as follows:

> (a) The following must be commenced within one year:
>
> * * *
>
> (5) Actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section.

Jones must acknowledge that his is not a suit on a bond, which admittedly is a specialized form of contract and, if sued upon, constitutes an action ex contractu. Rather, Jones insists that his action, although admittedly ex delicto, is controlled by the three year statute provided by Ala. Code § 6-6-148 (1975) for suits on attachment bonds. He relies entirely upon a dictum in Goldstein v. Nobles, 198 Ala. 430, 73 So. 822

(1916). This hoary case contains language which Jones would interpret to give him a three year statute of limitations. He would give a signficance to Goldstein which does not bear up under careful analysis. The pertinent language from Goldstein is as follows:

> Section 2966 of the Code of 1907 [6-6-148] authorizes suit upon the bond any time within three years before or after suit is determined, and our court has held that this right exists as to the common-law action as well as a suit upon a bond. Alsop v. Lidden, 130 Ala. 553, 30 South. 401; Brown v. Master, 104 Ala. 463, 16 South. 443. It is true these cases construed the statute as it existed prior to the Code of 1907, and a part of section 565 of the Code of 1896 (now section 2966 of the Code of 1907) was left out of the present Code, but there was no change as to the right to bring the action either before or after the determination of the suit. It has also been held that this statute applies to actions for the wrongful suing out of garnishments as well as attach-

> ments. Barber v. Ferrill, 57 Ala. 446. Hence the trial court did not err in overruling the defendant's demurrer to the complaint for failing to aver that the suit had been determined, or in sustaining the demurrers to the special pleas setting up that this action was prematurely brought. (emphasis added).

198 Ala. at 431-32; 73 So. at 823.

To understand Goldstein the first important fact to recognize is that the issue presented here by Jones was not presented in Goldstein. Nowhere was the Supreme Court in Goldstein confronted with the question of whether or not the victim of a wrongful attachment can bring a tort action for wrongful attachment at any time within three years after the occurrence. Rather, in Goldstein the issue was simply whether or not a tort action for an allegedly wrongful attachment can be brought before a determination in the

main case of the question of whether or not the attachment was, in fact or law, erroneous and therefore "wrongful". If the Alabama Court really meant to say that there is a three year statute of limitations for the tort of wrongful attachment (which this Court disputes, infra) its inartful expression of the thought in Goldstein was not a part of its holding, was unnecessary to its decision, and thus was pure dictum. Dictum is not the stuff for the fashioning of a new § 1983 limitation.

Secondly, and more importantly, this Court does not believe that the Alabama Court in 1916 either believed or intended to express a belief that the statute of limitations for wrongful attachment is three years in Alabama. Not only has the Alabama Court never reiterated or hinted

any such intent between 1916 and this date in 1984, but that court's limited intent can be discerned from the language which the court actually used. Its language may have been somewhat misleading, but what it was trying to say becomes clear upon a careful reading. When the court said "[s]ection 2966 of the Code of 1907 [§ 6-6-148] authorizes suit upon the bond any time within three years before or after suit is determined, and our court has held that this right exists as to the common-law action as well as a suit upon a bond" (emphasis supplied), the argument was to justify the bringing of a common law action before a determination of the efficacy of the garnishment writ. 73 So. at 823. The gratutious use of the words "or after" was not intended by the Alabama Court to be related gram-

matically to the three year statute of limitations, but rather to support the elimination of the defense of prematurity where such a suit is brought before a final determination of the legal effect of the attachment. While its grammar may have been imperfect, the Alabama Court's reasoning shines through.

Thirdly, the Alabama Court's citation of Alsop v. Lidden, 130 Ala. 548, 30 So. 401 (1901) and Brown v. Master, 104 Ala. 451, 16 So. 443 (1894), as authorities for its proposition again proves the limitation on that Court's holding. Neither Alsop nor Brown involve a choice between statutes of limitations. To the contrary, both of these earlier cases deal with the defense of prematurity where there had been no predetermination of a want of probable cause for an

attachment or a garnishment. This is a distinction similar to the well recognized distinction between the cause of action known as "malicious civil prosecution" (which requires a prior adjudication against the prosecuting party) and the cause of action known as "abuse of process" (which does not require such a prior adjudication). The Alabama Court was, of course, correct in holding that the common law or ex delicto action for wrongful attachment does not have as a prerequisite a judicial determination that the attachment was wrongful. It is a non sequitur which the Alabama Court could not have meant to indulge to jump to the conclusion that a person having such an ex delicto cause of action can wait three years to bring suit simply because he can bring an action ex contractu

on the attachment bond within three years.

Fourthly, the sharp difference between a contract claim and a tort claim cannot be overemphasized. In the classic tort action all actual damages (and even punitive damages under some circumstances) proximately caused by the wrongful act, are recoverable. However, in a suit on a bond the face amount of the bond places a limitation on the amount of recovery, whether the damages are actual, or punitive, or both. Perhaps it would be theoretically possible to draft a bond of an unlimited monetary amount covering all possible losses resulting from a breach of the bond. But this Court is not here dealing with such an hypothetical bond but with the law of Alabama which does not contemplate the execution

of a bond of unlimited amount in order to obtain a writ of attachment. See Ala. Code §§ 6-6-45, 6-6-120 (1975).

Lastly, it is not necessary for this Court to explaint or to avoid the 1916 dictum in Goldstein. The more recent truth, as expressed in Fomby v. City of Calera, supra, is that a federal court in ascertaining the proper period of limitations in § 1983 cases must look to the "essential nature" of the claim and cannot be controlled by the tag which the plaintiff may put on it. See Beard v. Stephens, 372 F.2d 685 (5th Cir. 1967). Applying this federal rule, this Court finds that the "essential nature" of Jones' claim, as unequivocally described in his own complaint, is that he sustained damages as a proxmiate consequence of a denial of "due process".

It is impossible to squeeze such a claim into the would-be category of a suit on an attachment bond in order to push the limitations period beyond one year. Jones' wishful thinking is well argued by counsel, but it ultimately fails. In Harrison v. Emens, 235 Ala. 319, 179 So. 219 (1938) the Supreme Court of Alabama recognized that the "essential nature" of a claim for wrongful attachment (whether brought on the attachment bond [ex contractu] or directly for vexatious or malicious conduct [ex delicto]) is tort-like. There, in suit brought on an attachment bond, the Alabama Court said:

> While the action in on the bond, as authorized by Code 1923, § 6214 [6-6-148], yet so far as "the nature and character of the evidence necessary to sustain it, is to be considered, bears a closer resemblance to an action for malicious prosecutions, than to any other action at common law. It

is necessary for the plaintff to aver in his complaint, the falsity of the particular fact, or facts, which may be stated in the affidavit as the ground of attachment. Tiller v. Shearer, 20 Ala. 527. The averment of the falsity of the affidavit, though it may be negative in form, and may involve proof of a negative, casts on the plaintiff the onus of supporting it by evidence either direct, or of circumstances from which the jury may fairly infer the untruth of the fact or facts stated in the affidavit. The right of recovery rests on the wrongful or vexatious use (or both), of the extraordinary and harsh remedy by attachment in [and] this forms the gravamen of the plaintiff's complaint. O'Grady v. Julian, 34 Ala. 88." Durr v. Jackson, 59 Ala. 203.

It is not essential to the existence of a cause of action that the attachment should be both wrongful and vexatious or malicious, but it is essential that it be wrongful; that is, that no debt exists for the collection of which the extraordinary process may be resorted to, or if such debt exists, that no ground for the issuance of the writ in fact existed. (emphasis supplied).

235 Ala. at 320; 179 So. at 219-20.

It is of more than passing interest that the cause of action, i.e., malicious prosecution, which the Court in Harrison found to bear a close resemblance to one for wrongful attachment, has a one year statute of limitations. See Ala. Code § 6-2-39A(a)(1) (1975). It is inconceivable to this Court that the Alabama Legislature intended, when it enacted § 6-6-148, to provide two years beyond the "catchall" statute and beyond the "malicious prosecution" statute when a claim for wrongful attachment is brought, not on the bond, but on a common law theory of wrongful attachment most closley resembling malicious prosecution. It would indeed be a strained construction of § 6-2-39(a)(5).

The statute of limitations in Alabama for claims arising out of violations of "due process" rights has routinely been considered by the Alabama courts and by the federal courts to be the "catch-all" one year statute of limitations contained in § 6-2-39(a)(5). Not only is this the clear holding of the Supreme Court of Alabama in Limbaugh v. Johnston, 393 So.2d 963 (Ala. 1981), but the Alabama Court is clearly echoed in Rubin v. O'Koren, 644 F.2d 1023 (5th Cir. Unit B, 1981), and in Nathan Rodgers Construction & Realty Corp. v. City of Saraland, 670 F.2d 16, 20 (5th Cir. Unit B), reh'g denied 676 F.2d 162 (5th Cir. Unit B, 1982) where the embryonic Eleventh Circuit said:

> [T]he one-year statute applied by the district court covers 'actions for any injury to the person or rights of another not

> arising from contract' Ala. Code § 6-2-39(a)(5). This is such an action.

To put it simply, the "essential nature" of Jones' complaint does not involve an attachment bond. Rather, the gravamen of his complaint is an alleged due process deprivation.

Not out of the pride manifested in Big Sam's expression of his prerogative as boss in the cotton field, but because the duty of a federal court is to select the most appropriate state statute of limitations in § 1983 actions, and because this Court deems that Jones' complaint of a constitutional denial of "due process" makes § 6-2-39(a)(5) a more analogous statute than any analogy which can be drawn as to a case brought under § 6-6-148, the Court concludes that defendants' motion to dismiss is due to be granted.

Plaintiff's complaint is therefore time barred.

An appropriate order will be entered.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN OF ALABAMA NORTHWESTERN DIVISION

CIVIL ACTION NO. 84-AR-5131-NW
Entered: 6/15/84

SAMUEL JONES, JR.,

Plaintiff

v.

PREUIT & MAULDIN, etc., et al.,

Defendants

ORDER

In conformity with the accompanying Memorandum Opinion, it is ORDERED that defendants' motion to dismiss be and the same is hereby GRANTED. Plaintiff shall have and recover NOTHING of defendants, and this action is hereby DISMISSED without prejudice to any state claim on an attachment bond.

Costs are taxed against plaintiff.

DONE this 15th day of June, 1984.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE.

APPENDIX A FOOTNOTES

1/ Despite the single structure for analysis, courts in this Circuit have used subtle but important differences in characterizing the essential nature of various Section 1983 claims. Some courts have denominated the facts as alleged in the complaint and a generalized statement of the legal claim as the essential nature of the claim. See Nathan Rodgers Construction & Realty Corp. v. City of Saraland, Alabama, 670 F.2d 16 (5th Cir. Unit B 1982) (essential nature is "suit against a city, its councilmen and mayor for an asserted denial of property rights resulting from delay in the issuance of a sewer permit"); Prince v. Wallace, 568 F.2d 1176 (5th Cir. 1978); Beard v. Stephens, 372 F.2d 685 (56th Cir. 1967). Other courts have gone one step further and used this literal description of the federal claim to group it with similar state law claims. See Whatley v. Department of Education, 673 F.2d 873 (5th Cir. Unit B 1982) (employment due process claims grouped together with actions for recovery of lost wages); see also McGhee v. Ogburn, 707 F.2d 1312 (11th Cir. 1983); Sewell v. Grand Lodge of the International Association of Machinists and Aerospace Workers, 445 F.2d 545 (5th Cir. 1971), cert. denied, 404 U.S. 1024, 92 S.Ct. 674, 30 L.Ed.2d 674 (1972).

Under the first approach, most of the work of evaluating the strength of the relationship between the federal claim and various state claims is left

for the second step of the process. State law controls the evaluation. If the facts and general description of the federal claim could not be reframed as a viable state law cause of action with a special statute of limitations, the claim would fall into the state's catchall provision simply because a state court would place it there. By contrast, under the second approach the crucial evaluation is drawn at the first stage of the inquiry, where state law is informative but not controlling. Thus, even if the complaint could not be recast as a state cause of action with a special statute of limitations, the court asks whether there is any state claim of the same general type.

The Wilson decision departs from both of these approaches because it characterizes all Section 1983 claims without regard to the particular facts underlying individual claims. Because previous precedents in this Circuit were decided under methods inconsistent with the Wilson analysis, we must determine anew the appropriate statute of limitations under Alabama law.

2/ The defendants have not suggested to this Court that Wilson only apply prospectively. We also note that the defendants have taken no action in reliance on precedent overruled by Wilson, and the policies of intra-state uniformity and certainty that underlie the Wilson decision would be hindered by failure to apply the decision retroactively. Each of these facts cuts in favor of retroactive

applicaiton of Wilson against the defendants under Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355-356, 30 L.Ed.2d 296 (1971).

3/ Since the filing of this appeal, the Alabama legislature has repealed Section 6-2-39 and extended the relevant limitations period to two years. See Act of Jan. 9, 1985, No. 85-39 1984 Ala. Acts - (to be codified at ALA. CODE § 6-2-38(1)). Because we hold that Section 6-2-34(1) is the appropriate state statute of limitations, we do not decide which version of the catchall statute (the statute dealing with personal injury claims sounding in trespass on the case) would be applied as a matter of federal law in this case.

4/ Alabama has modified the common law distinction between trespass and case, but the direct/indirect distinction remains a dominant method for separating the two causes of action in cases involving injury to the person. An indirect injury is one that is merely "consequential" and not a direct result of the wrongful act. The presence of some intervening contributory cause shows that an act is the indirect cause of injury. Sasser v. Dixon, 290 Ala. 17, 273 So.2d 182 (1973); see Borland v. Sanders Lead Co. Inc., 369 So.2d 523 (Ala. 1979) (establishing elements of proof for indirect trespass to property).

5/ The defendants do not raise any alternative basis for affirming the district court's dismissal of the case.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

PREUIT & MAULDIN ET AL. V. SAMUEL JONES, JR.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NO. 85-794. Decided January 27, 1986

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

In Wilson v. Garcia, ___ U.S. ___ (1985), we held that an action under 42 U.S.C. § 1983 should be considered a personal injury action for purposes of borrowing an appropriate state statute of limitations. The present case presents the question of what to do when more than one state statute of limitations applies to personal injury actions.

The respondent in this case is an Alabama farmer who brought a § 1983 action against petitioners for allegedly

violating his Fourteenth Amendment due process rights by causing his equipment to be seized pursuant to prejudgment attachment writs that petitioners obtained without notice or a hearing. The only significant issue on appeal was the appropriate statute of limitations to borrow from the Alabama Code. 763 F.2d 1250 (CA11 1985). The Eleventh Circuit explained that its task of applying Wilson v. Garcia, supra, was complicated by the fact that Alabama has not one but two personal injury statutes of limitations. Alabama Code § 6-2-34(1) governs actions for "any trespass to person or liberty, such as false imprisonment or assault and battery," and has been interpreted by the Alabama courts as applying to actions for trespass. Ala. Code § 6-2-39(a)(5) governs "[a]ctions for any injury to the

person or rights of another not arising from contract and not specifically enumerated in this section," and has been interpreted by the Alabama courts as applying to actions for trespass on the case. The Eleventh Circuit resolved its seeming dilemma in applying Wilson v. Garcia by reasoning that while not all § 1983 actions involve trespass, trespass is "the particular type of wrong that was most paradigmatic, the one category of wrongs that the legislators [who enacted § 1983] intended first and foremost to address." 763 F.2d, at 1255. Accordingly, the court held that the six-year statute of limitations provided by § 6-2-34(1), rather than the then one-year statute of limitations provided by § 6-2-39(a)(5), should govern § 1983 actions in Alabama.[1/]

The Eleventh Circuit's decision in this case conflicts with three en banc decisions by the United States Court of Appeals for the Tenth Circuit, all of which were companion cases to the decision we affirmed in Wilson v. Garcia, supra. In Hamilton v. City of Overland Park, Kansas, 730 F.2d 613 (CA10 1984) (en banc), cert. denied. ___ U.S. ___ (1985), the Tenth Circuit rejected, for § 1983 purposes, use of the one-year Kansas statute of limitations governing "[a]n action for assault, battery, malicious prosecution, or false imprisonment," and instead chose the two-year limitations period for "[a]n action for injury to the rights of another, not arising on a contract, and not herein enumerated."

In Mismah v. Murray City, 730 F.2d 1366 (CA10 1984) (en banc), cert. denied, ___ U.S. ___ (1985), the Tenth Circuit similarly rejected use of the one-year Utah statute of limitations governing "[a]n action for libel, slander, assault, battery, false imprisonment, or seduction," and, in the absence of an express Utah statute of limitations governing actions for injury to the rights of another, opted for the four-year limitations period for "[a]n acton for relief not otherwise provided by law." Finally, in McKay v. Hammock, 730 F.2d 1367 (CA10 1984) (en banc), a case in which certiorari was not sought, the Tenth Circuit noted that Colorado had distinct statutes of limitations for actions for trespass (one year) and trespass on the case (six years), and, find-

ing the distinction between trespass and case irrelevant to § 1983, opted instead to use the residuary three-year period for "[a]ll other actions of every kind for which no other period of limitation is provided by law."

As the foregoing cases demonstrate, the Tenth Circuit finds it inappropriate to borrow for § 1983 purposes a statute of limitations governing common-law trespasses, preferring instead to look for a statute more compatible with its characterization of a § 1983 action as "in essence an action for injury to personal rights." Garcia v. Wilson, 731 F.2d 640, 651 (1984), affirmed, ___ U.S. ___. The conflict between the Tenth and Eleventh circuits is evidenced with particular clarity in Hamilton, supra, where the statutes of limitations chosen and

rejected are virtual mirror images of the statutes of limitations chosen and rejected in this case.

The conflict regarding the appropriate criteria for chosing a statute of limitations for § 1983 actions is not limited to the Tenth and Eleventh Circuit, expressly following the Eleventh's Circuit's decision in this case, rejected a six-year Mississippi residuary statute of limitations which governs negligence and strict liability personal injury actions in that state, and instead decided that § 1983 cases should be governed by the one-year statute of limitations period governing "most, if not all, common-law intentional torts." Id. at 919. Gates v. Spinks is worth noting, not only because it is clearly inconsistent with the Tenth Circuit's decision in Mismah

v. Murray City, supra, but also because it highlights an effect of following the Eleventh Circuit's decision in this case which is not obvious from the present decision: The § 1983 statute of limitations will as a rule be shorter if based on a statute of limitations governing intentional torts than it would if based on a more general statute of limitations governing other personal injury actions.[2/]

It will not do to argue, as respondent does in his Brief in Opposition to Certiorari, that no conflict is possible because each state statutory scheme is sui generis. Id., at 5 - 8. It is conflicting principles, not variations in state statutory schemes, that have determined the statutes of limitations chosen for § 1983 actions in the Tenth Circuit

on the one hand and the Fifth and Eleventh Circuits on the other.

The conflict between the circuits presented by this case is not likely to disappear without guidance from this Court.[3/] While the Tenth Circuit's characterization of a § 1983 action as one for injury to personal rights is arguably somewhat different from the personal injury characterization we adopted in Wilson v. Garcia, supra, it seems doubtful that the Tenth Circuit will soon overrule its en banc decisions in Hamilton, supra, and Mismah, supra, in view of the fact that we denied certiorari in those cases after Wilson v. Garcia was decided. Had we considered those decisions inconsistent with Wilson, our normal course would have been to grant certiorari in order to vacate the decision below and remand for

reconsideration in light of Wilson. Since we did not see fit to call for the Tenth Circuit to reconsider those decisions, it is predictable that it will adhere to them, notwithstanding the conflicting decisions by the Eleventh and Fifth Circuits.

It is clear to me that the Court should provide further guidance to the lower courts on the issue here presented, and I see no benefit in delaying its resolution. While I understand the Court's reluctance to return so quickly to the issue that we had hoped to lay to rest in Wilson v. Garcia, supra, I must respectfully dissent.

APPENDIX B FOOTNOTES

1/ Section 6-2-39(a)(5) now provides a two-year statute of limitations, pursuant to an amendment enacted in January 1985.

2/ The following is a sampling, which does not purport to be exhaustive, of statute of limitations akin to those at issue in the present case. For each state, the first, longer statute of limitations governs actions described in language virtually identical to Ala. Code § 6-2-39(a)(5), and the second, shorter statute of limitations governs all of the following intentional torts: libel, slander, assualt, battery, and false imprisonment. Minn. Stat. §§ 541.05 (6 years); N.C. Gen. Stat. §§ 1-52(5) (3 years), 1-54 (3) (1 year); Okla. Stat. Tit. 12 §§ 95 (Third) (2 years), 95 (Fourth) (1 year); S.C. Code §§ 15-3-530 (5) (6 years), 15-3-550(1) (2 years).

3/ Uniformity could also be achieved, of course, by Congressional enactment of a uniform period of limitations for § 1983 actions. That course has much to commend it, but it is unacceptable, in my view, to delay resolving a conflict among the circuits in the hopes that Congress will intervene.

APPENDIX C

Samuel JONES, Jr., Plaintiff-Appellant,

v.

PREUIT & MAULDIN, a partnership composed of E.F. Mauldin, individually, and E.F. Mauldin as Executor or Administrator of the Estate of Leonard Preuit, Deceased; E.F. Mauldin; E.F. Mauldin as Executor or Administrator of the Estate of Leonard Preuit, Deceased; and Preuit Mauldin, Defendants-Appellees.

No. 86-7415.

United States Court of Appeals, Eleventh Circuit.

Feb. 2, 1987.

Debtor brought civil rights action based on allegations that there were constitutional violations inherent in Alabama attachment procedure. The United States District Court for the Northern District of Alabama, Northwestern Division, 586 F.Supp. 1563, No. CV84-AR-5131-NW,

William M. Acker, Jr., J., dismissed. On debtor's appeal the Court of Appeals, 763 F.2d 1250, reversed and remanded. On remand, the District Court, 634 F.Supp. 1520, entered summary judgment in favor of creditors, and debtor appealed. The Court of Appeals, Johnson, Circuit Judge, held that: (1) fact issue as to whether additional procedures allegedly followed by creditors in attaching debtor's cotton pickers satisfied demands of due process precluded summary judgment; (2) fact issue as to whether creditors knew or should have known that Alabama attachment statute violated clearly established constitutional rights precluded summary judgment as to creditors' claim of

good faith immunity; (3) debtor did not waive right to claim violation of due process; and (4) doctrine of claim preclusion did not bar debtor's action.

Affirmed in part and reversed in part.

1. **Federal Courts**

When reviewing appeal from final judgment, Court of Appeals can review rulings on previous interlocutory orders. 28 U.S.C.A. § 1292(a); Fed.Rules Civ.Proc. Rule 54(b), 28 U.S.C.A.

2. **Federal Courts**

Plaintiff could raise denial of his motion for partial summary judgment after filing proper notice of appeal from order granting summary judgment in favor of defendants. 28

U.S.C.A. § 1292(a); Fed.Rules Civ.Proc. Rule 54(b), 28 U.S.C.A.

3. **Federal Civil Procedure**

Fact issue as to whether additional procedures allegedly followed by creditors in attaching debtor's cotton pickers satisfied demands of due process precluded summary judgment in debtor's action challenging constitutionality of Alabama attachment statute decided before case holding that constitutionality of attachment statute depends upon statutorily mandated procedures and not upon procedures actually used. Ala.Code 1975, §§ 35-11-5, 35-11-110, 35-11-111; U.S.C.A. Const.Amend. 14.

4. **Civil Rights**

Creditors' seizure of debtor's cotton pickers without notice under

Alabama's mechanic's lien statute occurred pursuant to established state policy, so that relief was available to debtor under federal civil rights statute. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 14; Ala.Rules Civ.Proc., Rule 64(a), (b); Ala.Code 1975 §§ 6-6-43, 6-6-45, 6-6-256, 35-11-110, 35-11-111.

5. **Civil Rights**

Private defendants in a federal civil rights action seeking damages on account of unconstitutional attachment are entitled to qualify immunity if they either knew nor reasonably should have known that the attachments violated clearly established constitutional rights. 42 U.S.C.A. § 1983.

6. **Civil Rights**

If immunity was firmly established in common law when Congress enacted federal civil rights statute and if strong policy reasons supported its continued use, immunity is available under the statute; however, courts cannot engraft new immunities onto the statute, nor can courts recognize traditional immunities that eviscerate statute's policies. 42 U.S.C.A. § 1983.

7. **Federal Civil Procedure**

Fact issue as to whether creditors who attached debtor's cotton pickers knew or should have known that Alabama attachment statute violated clearly established constitutional right precluded summary judgment as to creditors' claim of good-

faith immunity in debtor's civil rights action. Ala.Rules Civ. Proc., Rule 64(a); Ala.Code 1975, §§ 35-11-110, 35-11-111; 42 U.S.C.A. § 1983.

8. **Civil Rights**

Debtor did not waive right to claim violation of due process following attachment of his cotton pickers without notice or hearing, based on his alleged failure to utilize pretaking and posttaking remedies, where no pretaking procedures were available to debtor under Alabama law, and deprivation occurred as result of established state policy. Ala.Code 1975, § 35-11-111; Ala.Rules Civ.Proc., Rule 64(a); 42 U.S.C.A. § 1983.

9. **Civil Rights**

Party's failure to request available pretaking hearing constitutes waiver and precludes relief under federal civil rights statute for deprivation of property. 42 U.S.C.A. § 1983.

10. **Civil Rights**

Action under federal civil rights statute in federal court is precluded if issues involved in action could have been raised in prior state court proceeding.

11. **Federal Courts**

In determining preclusive effect of state court proceeding, Court of Appeals must accord that proceeding same preclusive effect it would have under state law.

12. **Judgment**

Alabama law requires presence of four elements for there to be

claim preclusion: prior judgment rendered by court of competent jurisdiction; substantially identical parties in both suits; prior judgment rendered on the merits; and same cause of action in both suits.

13. **Judgment**

If all four elements of claim preclusion are present under Alabama law, prior judgment precludes subsequent litigation on same cause of action, including any issues that were not but could have been litigated in prior proceeding.

14. **Judgment**

Doctrine of claim preclusion did not bar debtor's civil rights action challenging attachment of his cotton pickers, despite availability of motion under Alabama law seeking

forfeiture of one of bonds posted by creditors; to obtain relief under Alabama law, debtor was required to show that attachment violated provisions of attachment statute while to obtain relief under federal civil rights statute he was required to demonstrate that it did not violate provisions of attachment statute. 42 U.S.C.A. § 1983; Ala.Rules Civ.Proc., Rule 65-1; Ala.Code 1975, § 6-6-45.

15. **Judgement**

Debtor's failure to raise claim for damages under federal civil rights statute as counterclaim in state court attachment proceedings did not preclude his federal civil rights action challenging the attachment; claim was not compulsory

counterclaim. 42 U.S.C.A. § 1983; Ala.Rules Civ.Proc., Rule 65.1; Ala.Code 1975, § 6-6-148.

16. **Judgment**

Failure to raise claim as counterclaim precludes subsequent suit on that claim only if claim is considered to compulsory counterclaim.

17. **Attachment**

Under Alabama law, to obtain damages on a count of wrongful attachment, debtor can either bring independent suit under federal civil rights statute or file motion seeking forfeiture of bonds in original proceeding. 42 U.S.C.A. § 1983; Ala.Rules Civ.Proc., Rule 65.1; Ala.Code 1975, § 6-6-148.

18. **Set-Off and Counterclaim**

Claim for damages for wrongful attachment is not compulsory coun-

terclaim in proceeding in which attachment was effected.

Burr & Forman, C.V. Stelzenmuller, F.A. Flowers, III, Birmingham, Ala., plaintiff-appellant.

Potts, Young, Blasingame & Putnam, T. Michael Putnam, Florence, Ala., Ronald C. Forehand, Asst. Atty. Gen. for State of Ala., Montgomery, Ala., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Alabama.

Before HILL and JOHNSON, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

JOHNSON, Circuit Judge:

This case involves an appeal by the plaintiff from an order denying his motion for partial summary judgment and another order granting the defendants' motion for summary judgment. We affirm the district court's denial of plaintiff's motion

for partial summary judgment but reverse its order granting summary judgment in favor of the defendants.

I

BACKGROUND

Samuel Jones, the plaintiff, owned three International Harvester cotton pickers. In 1981, Jones employed Preuit & Mauldin ("P & M") to repair these pickers. P & M was a partnership composed of Edward Mauldin individually and in his capacity as the executor of the estate of Leonard Preuit. P & M agreed to let Jones pay his repair bill after the 1981 fall harvest. However, Jones also owed money to the Farmer's Home Administration ("FHA"), and the checks he received for the cotton he picked that fall

were made out jointly to him and the FHA. Because the FHA refused to let Jones keep any of the proceeds, he was unable to pay the money he owed P & M.

P & M not having been paid, Leonard Preuit Mauldin, the son of Edward Mauldin and an employee of P & M, consulted with David Martin, an attorney. Upon Martin's advice, P & M filed three separate suits in state court - one for each picker - and obtained a writ of attachment for each picker. These writs were issued, and the pickers were seized, without any notice to Jones. The pickers were sold to P & M at a judicial sale in satisfaction of the judgments P & M eventually obtained against Jones in the state court actions.

Jones then filed this action under 42 U.S.C.A. § 1983 against P & M, Edward Mauldin, both individually and in his capacity as the executor of Leonard Preuit's estate, and Leonard Mauldin, alleging that the prejudgment seizure of his cotton pickers without notice violated his rights under the due process clause of the Fourteenth Amendment. Jones sought $200,000 in compensatory damages and a like amount in punitive damages plus costs. The district court, 586 F.Supp. 1563, originally dismissed the suit on the grounds that the claim was barred by a one year statute of limitations. Another panel of this Court reversed that ruling, holding that a six year staute of limitations applied, and

remanded the case for further proceedings. 763 F.2d 1250 (11th Cir. 1985).

On remand and after the close of discovery, Jones filed a motion for partial summary judgment seeking a declaratory judgment that certain provisions of the Alabama attachment statute were unconstitutional. The defendants filed a motion for summary judgment as well, requesting the court to dismiss the case on a number of grounds. The court denied Jones's motion and granted the defendants' motion. 634 F.Supp. 1520. This appeal followed.

II

DISCUSSION

A. CONSTITUTIONALITY OF ALABAMA ATTACHMENT STATUTE

[1-3] Jones argues that the district court erred in refusing to

grant him partial summary judgment on the issue whether Ala.Code §§ 35-11-5, -110, and -111 were unconstitutional.[1/] The denial of a motion for summary judgment will be reversed only for an abuse of discretion. Johnson v. Bryant, 671 F.2d 1276, 1279 (11th Cir. 1982). In the state court actions P & M sought the enforcement of mechanic's liens against the cotton pickers, thus the writs of attachment were issued under Section 35-11-111. However, the defendants seemingly maintained before the district court that they had voluntarily followed procedures not mandated by the statute. These additional procedures allegedly satisfied the demands of due process. Jones did not supply

any material with his motion rebutting the defendants' allegation. Furthermore, the Supreme Court did not hold until nearly a year later in Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), that the constitutionality of an attachment statute depends upon the statutorily-mandated procedures and not upon the procedures actually used. Given both the undeveloped facts and the state of the law at the time, we cannot say that the district court abused its discretion in denying Jones's motion for partial summary judgment.

B. APPLICATION OF PARRATT V. TAYLOR

[4] In awarding summary judgment in favor of the defendants, the

district court found that Section 1983 relief was unavailable under the rule of Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). In Parratt, the Supreme Court held that a negligent deprivation of property that did not occur pursuant to an established state procedure does not violate the due process clause of the Fourteenth Amendment if the state provides an adequate post-deprivation remedy. Ever since Hudson v. Palmer, 468 U.S. 517, 530-36, 104 S.Ct. 3194, 3202-05, 82 L.Ed.2d 393 (1984), this rule applies to intentional deprivations of property as well. However, Hudson did not eliminate the requirement that the deprivation not occur pursuant to an established

state procedure. Therefore, if an intentional deprivation of property occurs pursuant to an established state policy, Parratt does not apply. Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-36, 102 S.Ct. 1148, 1157-58, 71 L.Ed.2d 265 (1982).

In seizing the cotton pickers without a hearing, P & M did act pursuant to an established state procedure. Ala.R.Civ.P. 64(a) provides for pre-judgment seizures in actions for money damages "for the purpose of securing satisfaction of the judgment ultimately to be entered in the action...." Rule 64(a) does not specify any procedures but states merely that such seizures shall occur "under the cir-

cumstances and in the manner provided by law...." Thus, whether P & M effected the seizures pursuant to an established state procedure depends upon the requirements of the particular attachment provisions on which P & M relied.

As previously indicated, P & M relied upon Alabama's mechanic's lien provisions. Ala.Code § 35-11-110 (1975) creates a lien in favor of a repairman against any vehicle he repaired. Ala.Code § 35-11-111 (1975) provides for the enforcement of such a lien by attachment upon the execution of a bond "as in other cases of attachment" and the making of an affidavit stating only that a mechanic's lien exists, that the amount owed for the repairs is due

and unpaid, and that the attachment is not sued out for purposes of harassment. No pre-taking notice is required, and the affidavit need not state that a risk of destruction or concealment of the vehicle exists. Nor do the provisions of the general attachment statute incorporated by reference into Section 35-11-111 make any mention of a pre-taking hearing. Ala.Code §§ 6-6-43 and -45 (1975).

The defendants point to Ala.R.Civ.P. 64(b) which requires a hearing before the issuance of a writ of attachment unless the court determines that there exists a risk of concealment, transfer or harm to the property. Because P & M's affidavit did not aver such a risk,

they argue that the seizure of the cotton pickers without any pretaking hearing contravened Rule 64(b) and therefore did not occur pursuant to an establsihed state policy.

However, Rule 64(b) applies only to actions in detinue and to actions "whereby the owner of a security interest in personal property seeks to recover possession of said personal property prior to judgment...." P & M's actions did not fall into either category. Detinue is an action for the recovery of personal property wrongfully detained. Ivery v. Verbeck, 461 So.2d 813, 815-16 (Ala.Civ.App. 1984); Ala.Code § 6-6-256 (1975). P & M sought payment on repair bills; therefore, its actions were in debt,

not detinue. Foshee v. General Telephone Company of the Southeast, 295 Ala. 70, 322 So.2d 715, 717 (1975). Nor did P & M's actions satisfy the second category, for P & M lacked an enforceable security interest in the cotton pickers. A security interest is not enforceable and does not attach unless either the secured party is in possession of the collateral or the debtor has signed a security agreement that contains a description of the collateral. Ala.Code § 7-9-203 (1975). P & M had neither possession of the cotton pickers nor a security agreement signed by Jones. Therefore, P & M could not have proceeded under Rule 64(b). Furthermore, P & M's affidavits and the state court's

findings recite the language required by Sections 35-11-110 and 6-6-43 and not that required by Rule 64(b), confirming that P & M was acting pursuant to Rule 64(a). Cf. Ex parte Martin, 412 So.2d 815, 817 (Ala.Civ.App. 1982) (enforcement of statutory landlord's lien falls within Rule 64(a) and not (b)). Therefore, the seizure of the cotton pickers without notice occurred pursuant to an established state policy, and Parratt does not apply.

C. **QUALIFIED IMMUNITY**

[5] In granting the defendants summary judgment, the district court also relied on the fact that P & M had acted in good faith reliance on a statute that was not clearly unconstitutional. The propriety of

that finding depends upon whether private defendants in a Section 1983 suit seeking damages on account of an unconstitutional attachment are entitled to qualified immunity. The Supreme Court has expressly reserved this question. Lugar, 457 U.S. at 942 n. 23, 102 S.Ct. at 2756 n. 23. However, two circuits have held that private defendants are entitled to such immunity if they neither knew nor reasonably should have known that the attachments violated clearly established constitutional rights. Buller v. Buechler, 706 F.2d 844, 850-53 (8th Cir. 1983); Folsom Investment Co. v. Moore, 681 F.2d 1032, 1037-38 (5th Cir. Unit A 1982). But see Howerton v. Gabica, 708 F.2d 380, 385 n. 10

(9th Cir. 1983) (private defendants not entitled to good faith immunity under Section 1983). We agree with the analyses of the Fifth and Eighth Circuits and hold that such immunity for private parties exists. However, because the defendants here failed to demonstrate clearly their good faith, the district court erred in awarding them summary judgment.

[6] Section 1983 provides that every person who, acting under color of state law, deprives another person of a constitutional right is liable to that person for damages.[2/] On its face, Section 1983 admits of no immunities. Imbler v. Pachtman, 424 U.S. 409, 417, 96 S.Ct. 984, 988, 47 L.Ed.2d 128 (1976). Nonetheless, the Supreme Court has rea-

soned that in enacting Section 1983, Congress did not intend to supplant traditional immunities embedded in the common law. Therefore, if an immunity was firmly established in the common law when Congress enacted Section 1983 and if strong policy reasons support its continued use, the immunity is available under Section 1983. Owen v. City of Independence, 445 U.S. 622, 637-38, 100 S.Ct. 1398, 1408-09, 63 L.Ed.2d 673 (1980); Pierson v. Ray, 386 U.S. 547, 554-55, 87 S.Ct. 1213, 1217-18, 18 L.Ed.2d 288 (1967). However, the courts cannot engraft new immunities onto the statute. Tower v. Glover, 467 U.S. 914, 922-23, 104 S.Ct. 2820, 2826, 81 L.Ed.2d 758 (1984). Nor can the courts recognize tradi-

tional immunities that eviscerate the policies of Section 1983. Newport v. Fact Concerts, Inc., 453 U.S. 247, 258-59, 101 S.Ct. 2748, 2755, 69 L.Ed.2d 616 (1981). The good faith immunity that the defendants claim here satisfies both criteria and is therefore cognizable in this suit.

At the time of Section 1983's enactment, the common law tort of malicious prosecution made actionable the wrongful institution of attachment proceedings. Some jurisdictions even had an independent tort of wrongful attachment. However, a person was not liable under either tort unless he commenced the attachment with malice and without probable cause. Buller, 706 F.2d at

851; Folsom Investmnet Co., 681 F.2d at 1038. See also W. Prosser, Handbook of the Law of Torts, § 120 (4th Ed. 1971). Although such defenses technically are not immunities, Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Monroe v. Pape, 365 U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.Ed.2d 492 (1961). Thus, in Pierson, 386 U.S. at 555-57, 87 S.Ct. at 1218-19, the Supreme court held that a police officer was entitled to immunity under Section 1983 if he arrested someone under a statute that he in good faith believed to be valid even though it was later held unconstitutional. Because a police

officer was not liable under the common law for false arrest or false imprisonment if he acted in good faith and with probable cause, he was entitled to a good faith immuity under Section 1983. See also Wood v. Strickland, 420 U.S. 308, 318-19, 95 S.Ct. 992, 999, 43 L.Ed.2d 214 (1975) (that public school officials liable under state tort law for malicious acts only establishes good faith immunity under Section 1983. Likewise, the availability of similar defenses in actions for malicious prosecution and wrongful attachment establishes the historical precedent for recognizing good faith immunity here.

In addition, strong policy reasons justify the recognition of good

faith immunity for private parties in these circumstances. The most compelling justification is that a person should not be penalized for resorting to the courts in order to enforce rights he in good faith believed he possessed. Buller, 706 F.2d at 851; Folsom Investment Co., 681 F.2d at 1038. Such immunity would not impair deterrence of unlawful conduct because persons who seek an attachment that they know or reasonably should know violates clearly established constitutional and statutory rights would remain liable. Buller, 706 F.2d at 851.

In Downs v. Sawtelle, 574 F.2d 1, 15-16 (1st Cir.), cert. denied, 439 U.S. 910, 99 S.Ct. 278, 58 L.Ed.2d 255 (1978), a case involving

an involuntary sterilization, the court refused to accord good faith immunity to private parties acting in concert with state officials. The court observed that public officers receive such immunity because otherwise few people would be willing to serve in government. Because private citizens are not in an analogous position, the court reasoned that they are not entitled to a similar immunity. Because the Supreme Court has adopted a "functional" rather than a "derivative" approach to immunities, see Harlow v. Fitzgerald, 457 U.S. 800, 808-11, 102 S.Ct. 2727, 2732-34, 73 L.Ed.2d 396 (1982); Dennis v. Sparks, 449 U.S. 24, 28-32, 101 S.Ct. 183, 186-88, 66 L.Ed.2d 185 (1980), the court

in Downs was correct in holding that a private defendant is not entitled to immunity simply because the state officials with whom he acts in concert receive immunity. However, a private defendant should not be denied immunity simply because he is not in the same position as those state officials. Instead, the court should determine under the particulars of each case whether the common law traditionally extended immunity to private parties and whether the recognition of that immunity is consistent with the goals of Section 1983. In this case the defendants are not seeking any derivative immunity but claim the good faith immunity allowed them in their own right under common law. Thus, Downs does not command a different result.

[7] Although the defendants are entitled to assert a claim of good faith immunity, the record fails to show that they are entitled to summary judgment. In determining whether a party moving for summary judgment has shown the absence of a genuine dispute as to any material fact, this Court must independently assess the record in the light most favorable to the nonmoving party. Morrison v. Washington County, Alabama, 700 F.2d 678, 682 (11th Cir.), cert. denied, 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983). Having reviewed the record under that standard, we cannot say that no genuine dispute exists as to whether the defendants knew or should have known that the attachment statute

relied on here violated a clearly established constitutional right.

Admittedly, the defendants are entitled to immunity if their conduct did not contravene a clearly established constitutional right; however, the defendants bear the burden of proving that any right they violated was not clearly established. Harlow, 457 U.S. at 808, 102 S.Ct. at 2732. In support of their claim of immunity, the defendants point to the fact that, at the time of the seizure, no published opinion had held the attachment statute they relied on unconstitutional, and that Mitchell v. W.T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974), in which the Supreme Court upheld a garnishment

statute, had muddled the standards for a constitutional attachment. Nonetheless, numerous cases prior to the attachments here indicated the constitutional invalidity of an attachment without notice absent a risk of immediate harm. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 605-08, 95 S.Ct. 719, 721-23, 42 L.Ed.2d 751 (1975); Fuentes v. Shevin, 407 U.S. 67, 80-93, 92 S.Ct. 1983, 1994-2000, 32 L.Ed.2d 555 (1972); Sniadach v. Family Finance Corporation of Bay View, 395 U.S. 337, 338-42, 89 S.Ct. 1820, 1821-23, 23 L.Ed.2d 349 (1969). In fact, in Mitchell, 416 U.S. at 608-09, 94 S.Ct. at 1900, although the attachment had occurred without any notice or hearing, the

creditor had shown a risk of concealment. Also, in an unpublished opinion issued six months prior to the attachments by P & M, the Alabama attachment statute at issue here had ben declared unconstitutional, the court stating that the statute's unconstitutionality was obvious. Wiggins v. Roberts, No. 75-M-1760, slip op. (N.D.Ala.1978). Even assuming arguendo that private defendants cannot reasonably be held accountable for unpublished opinions, Wiggins nonetheless indicates that the defendants should have known on the basis of Di-Chem, Fuentes, and Sniadach that an attachment without notice was unconstitutional. Furthermore, the defendants obtained

the assistance of a lawyer who should have explained to them the import of these holdings.[3/]

The defendants also argue that at the time of the seizures here the Supreme Court had never held that private defendants were liable for damages under Section 1983 on account of an unconstitutional attachment. However, Di-Chem, Mitchell, Fuentes, and Sniadach all implicitly held that a creditor's reliance on an attachment statute was state action; otherwise, the Court never would have reached the due process question. In fact, in Fuentes the judgment ran against both the creditor and the state officials. Although Fuentes involved only declaratory and injunctive

relief, nothing in Fuentes suggested that the outcome would have been different if the debtor had asked for damages. See also Adickes v. S.H. Kress & Co., 398 U.S. 144, 150-52, 90 S.Ct. 1598, 1604-05, 26 L.Ed.2d 142 (1970) (private party's joint participation with state official in a conspiracy constituted state action allowing damages under Section 1983). Although the defendants' argument raises a close question, any doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. Hayden v. First National Bank of Mr. Pleasant, Texas, 595 F.2d 994, 996-97 (5th Cir. 1979). Consequently we cannot say that the defendants have satisfied their bur-

den and shown that their conduct did not violate a clearly established constitutional right.

D. **WAIVER**

[8] The district court also found that Jones had waived his right to claim a violation of due process because he had failed to utilize available pre-taking and post-taking remedies. A week before the seizure, two deputies inspected the pickers at Jones's farm. Furthermore, a week passed between the time the sheriff seized the first picker and the time he seized the remaining two. During this interlude Jones consulted with a lawyer; however, Jones did not challenge the writs of attachment until nearly eighteen months after

the seizures. Thus, the court concluded, Jones had an opportunity to interpose a pre-seizure objection, and his failure to do so, combined with his failure to make a prompt post-taking objection, constituted a knowing and voluntary waiver of his due process rights.

[9] A party's failure to request an available pre-taking hearing constitutes a waiver and precludes relief under section 1983 for the deprivation of property. Grandison v. Smith, 779 F.2d 637 641-42 (11th Cir.1986). However, no waiver occurred here because there were no pre-taking procedures available to Jones. Neither Section 35-11-111 nor Rule 64(a) establishes any pre-taking procedures for chal-

lenging the issuance of writs of attachment. Therefore, Jones had no pre-deprivation rights he could have waived.

Nor can the fact that Jones waited eighteen months before making any formal post-taking challenge constitute a waiver of his pre-taking rights to due process. Furthermore, in Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 1982), the Supreme Court held that, if a deprivation without prior notice or hearing occurred as the result of an established state policy, the availability of post-deprivation state remedies did not bar the availability of a Section 1983 action. As previously indicated, the seizure of

Jones's cotton pickers without notice or hearing occurred pursuant to an established state policy. Therefore, the district court's holding that Jones's failure to invoke promptly the state's post-taking remedies constitutes a waiver contravenes the holding in Logan. Consequently, we find that Jones did not waive his rights to due process.

E. **RES JUDICATA**

[10-13] The district court found also that this suit was barred because Jones could have raised his Section 1983 claim in his motion under Ala.R.Civ.P. 65.1 in state court seeking the forfeiture of one of the bonds posted by P & M. See Allen v. McCurry, 449 U.S. 90, 94-105, 101 S.Ct. 411, 414-20, 66

L.Ed.2d 308 (1980) (suits for damages under Section 1983 collaterally estopped by motion to suppress in state criminal proceeding). An action under Section 1983 in federal court is precluded if the issue involved in the action could have been raised in a prior state court proceeding. Migra v. Warren City School District Board of Education, 465 U.S. 75, 80-85, 104 S.Ct. 892, 895-98, 79 L.Ed.2d 45 (1984). However, in determining the preclusive effect of a state court proceeding, this Court must accord that proceeding the same preclusive effect it would have under state law. Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 379-82, 105 S.Ct. 1327, 1331-33, 84 L.Ed.2d 274

(1985); Kremer v. Chemical Construction corp., 456 U.S. 461, 481-82, 102 S.Ct. 1883, 1897-98, 72 L.Ed.2d 262 (1982). Alabama law requires the presence of four elements for there to be claim preclusion: 1) a prior judgment rendered by a court of competent jurisdiction; 2) substantially identical parties in both suits; 3) a prior judgment rendered on the merits; and 4) the same cause of action in both suits. Missildine v. Avondale Mills, Inc., 415 So.2d 1040, 1042 (Ala.1981). If all four of these elements are present, the prior judgment precludes subsequent litigation on the same cause of action, including any issues that were not but could have been litigated in the prior proceeding. Rus-

sell v. Russell, 404 So.2d 662, 664 (Ala.1981).

[14] Claim preclusion does not exist here because Rule 65.1 and Section 1983 do not present the same cause of action. Under Alabama law, a cause of action in one case is the same as that in another case if the evidence needed to sustain the second action would also have sustained the first action. Buck Creek Industries, Inc. v. Alcon Construction, Inc., 631 F.2d 75, 78 (5th Cir.1980); Gulf American Fire & Casualty Co. v. Johnson, 209 So.2d 212, 218 (Ala.1968). When a creditor obtains a writ of attachment, he must post a bond for damages in case of a wrongful attachment. Ala.Code § 6-6-45 (1975). Rule 65.1 allows

the debtor to enforce the surety's liability on that bond if the attachment was wrongful. However, the inquiry under Rule 65.1 concerns only whether any of the statutory grounds for swearing out a writ of attachment exists. If the attachment satisfies the statutory requirements, relief under Rule 65.1 is available. Painter v. Munn, 117 Ala. 322, 23 So. 83, 86-87 (1897). In contrast, relief under Section 1983 is available here only if the attachment occurred pursuant to an established state procedure. See Parratt, 451 U.S. at 541, 101 S.Ct. at 1916. Therefore, to obtain relief under Rule 65.1 the debtor must show that the attachment violated the provisions of the attach-

ment statute while to obtain relief under Section 1983 he must demonstrate that it did not violate the provisions of the attachment statute. Such diametrically opposed requirements prevent their treatment as the same cause of action.

[15-18] Nor is this action precluded because Jones failed to raise his claim for damages under Section 1983 as a counterclaim in the state court proceedings. The failure to raise a claim as a counterclaim precludes a subsequent suit on that claim only if the claim is considered to be a compulsory counterclaim. Eatman v. Goodson, 36 Ala.App. 360, 58 So.2d 129, 132-33 (1951), cert. denied, 257 Ala. 239, 58 So.2d 133 (1952); Weaver v.

Brown, 87 Ala. 533 6 So. 354 (1888). Ala.Code § 6-6-148 (1975) creates an independent cause of action for wrongful attachments and allows the recovery of compensatory and punitive damages. Thus, to obtain damages on account of a wrongful attachment, a debtor can either bring an independent suit under that section of file a Rule 65.1 motion in the original proceeding. State v. Chandler, 460 So.2d 1302, 1304 (Ala.Civ.App. 1984). Therefore, a claim for damages for a wrongful attachment is not a compulsory counterclaim in the proceeding in which the attachment was effected. Consequently, Jones's claim for damages under Section 1983 is not barred.

Accordingly, the district court's order denying Jones's motion

for partial summary judgment is AFFIRMED. The order granting summary judgment in favor of the defendants is REVERSED.

APPENDIX C FOOTNOTES

* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

1/ The defendants contend that Jones failed to appeal the order denying his motion for partial summary judgment. That contention is meritless. The denial of a motion for partial summary judgment is an interlocutory order. Because the court did not make that order appealable under either 28 U.S.C.A. § 1292(a) or Fed.R.Civ.P. 54(b), Jones could not have appealed that order when it was entered. However, when reviewing an appeal from a final judgment, this court can review rulings on previous interlocutory orders. Aaro, Inc. v. Daewoo International (America) Corp., 755 F.2d 1398, 1400 (11th Cir. 1985). Jones filed a proper notice of appeal from the court's order granting summary judgment in favor of the defendants; therefore, Jones can raise the denial of his motion for partial summary judgment in this appeal.

On the other hand, the defendants' argument that, if the attachment statute is unconstitutional, Jones is entitled only to nominal damages cannot be addressed in this appeal. That issue was not presented in either the defendants' or Jones's motion for summary judg-

ment, thus the defendants cannot raise it now.

2/ The statute provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

42 U.S.C.A. § 1983.

3/ P & M and Edward Mauldin contend that summary judgment should be granted in their favor because only Leonard Mauldin and Sherman Crisler, P & M's general manager, were involvd in obtaining the writs of attachment. In fact Edward Mauldin stated that he was totally unaware that Leonard Mauldin and Crisler had obtained the writs until the seizures had been completed. Whether corporations are vicariously liable under Section 1983 for the acts of their employees is an unsettled question. Compare Iskander v. Village of Forest Park, 690 F.2d 126, 128-29 (7th Cir.1982) (private employers not vicariously liable), with Croy v.

Skinner, 410 F.Supp. 117, 123 (N.D.GA. 1976) (private employers vicariously liable). However, even though municipalities generally are not vicariously liable under Section 1983 for the acts of their employees, see Monell v. Depoartment of Social Services, 436 U.S. 658, 691-95, 98 S.Ct. 2018, 2036-38, 56 L.Ed.2d 611 (1978), they can be liable for even the single act of a policy-making individual. Pembaur v. City of Cincinnati, ___ U.S. ___, 106 S.Ct. 1292, 1297-99, 89 L.Ed.2d 452 (1986); City of Oklahoma City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2427, 2432-36, 85 L.Ed.2d 791 (1985). Therefore, corporations too may be liable for the actions of policy-making employees. The record supports the view that Leonard Mauldin and Sherman Crisler were key management personnel of P & M and that their actions in seizing the cotton pickers constituted the policy of P & M. Therefore, liability can be attributed to P & M and to Edward Mauldin as a general partner of P & M. Furthermore, both P & M and Edward Mauldin ratified the attachment by accepting its benefits. Thus, they can be held liable under Section 1983.

APPENDIX D

Samuel JONES, Jr.,
Plaintiff-Appellant

v.

PREUIT & MAULDIN,
a partnership, composed of
E. F. Mauldin, individually, and
E. F. Mauldin, as Executor
or Administrator of the Estate
of Leonard Preuit, Deceased;
E. F. Mauldin;
E. F. Mauldin as Executor or
Administrator of the Estate
of Leonard Preuit, deceased; and
Preuit Mauldin,

Defendants-Appellees.

No. 86-7415.

United States Court of Appeals,
Eleventh Circuit

July 24, 1987.

Debtor whose property was attached by private creditors brought suit against creditors for damages under § 1983. The United States District court for the Northern District of Alabama, No. CV84-AR-5131-NW, William M. Acker, Jr., J., 586

F. Supp. 1563, dismissed. The Court of Appeals, 763 F.2d 1250, reversed and remanded, and the District Court, 634 F. Supp. 1520, entered summary judgment in favor of creditors. On appeals, the Court of Appeals, 808 F.2d 1435, affirmed in part and reversed in part. On petition for rehearing and suggestion for rehearing en banc, the Court of Appeals, Hill, Circuit Judge, held that: (1) creditors were immune from damages insofar as attachment of debtor's property without hearing pursuant to Alabama statute may have violated debtor's constitutional rights; (2) complaint that employee of private creditors attempted to "rig" judicial sale of debtor's attached property failed to show state action and thus to state § 1983 claim; and (3) debtor lacked standing to

challenge portion of Alabama's attachment statute authorizing nonjudicial officer to issue writ of attachment.

Affirmed.

Johnson, Circuit Judge, filed a dissenting opinion.

1. Officers and Public Employees

Whether statutory or constitutional right was clearly established at time that alleged wrong was committed, and thus whether government officials are entitled to qualified immunity, is question of law to be decided by court.

2. Civil Rights

Where constitutioanl deprivation occurred as result of established state policy, availability of postdeprivation state remedy does not bar availablity of § 1983 action. 42 U.S.C.A. § 1983.

3. Civil Rights

Private creditors did not violate debtor's constitutional rights, as known to reasonable person at time, and were immune from damages for attachment of debtor's property without hearing prusuant to Alabama statute; creditors presented sworn affidavit indicating that attachment was used in response to specific debt for labor and materials, state judge issued writ and retained judicial control of process from beginning to end, service of order of attachment and complaint to enforce mechanic's lien was made upon debtor in lawful manner, creditors posted bond to minimize risk that ex parte procedure would lead to wrongful taking, and state law gave creditor post-deprivation opportunity to challenge attachment in timely manner. Ala. Code 1975, § 35-11-111; 42 U.S.C.A. § 1983.

4. Civil Rights

Complaint that employee of private creditors attempted to "rig" judicial sale of debtor's attached property failed to show state action and thus to state § 1983 claim; neither complaint nor any document filed in district court asserted that action allegedly undertaken by private creditors' employee to dissuade another potential bidder from bidding on attached property was undertaken in collusion with any state official who was overseeing sale. 42 U.S.C.A. § 1983.

5. Constitutional Law

Debtor whose property was attached lacked standing to challenge, as constitutional, portion of Alabama's attachment statute authorizing nonjudicial officer to issue writ of attachment, as judge issued writ in debtor's case, not clerk, so

that debtor was not adversely affected by that part of statute. Ala. Code 1975, § 6-6-148.

Appeal from the United States District Court for the Northern District of Alabama.

ON PETITION FOR REHEARING

Before HILL and JOHNSON, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

HILL, Circuit Judge:

The defendants, Preuit & Mauldin ("P & M"); E. F. Mauldin, both individually and in his capacity as administrator of the estate of Leonard Preuit; and Preuit Mauldin, petition for a rehearing en banc of this panel's opinion in Jones v. Preuit & Mauldin, 808 F.2d 1435 (11th Cir. 1987).[1/] Although they

do not seek a reconsideration of the panel opinion, we treat their petition as such in accordance with Eleventh Circuit Rule 26(f) and Rule V.C.b(1) of our Internal Operating Procedures.[2/] See Lewis v. Hillsboro Transit Authority, 726 F.2d 668, 669 (11th Cir. 1984).

In their petition, the defendants seek reconsideration of our holding that they are not entitled to qualified immunity. On rehearing, we reaffirm our holding that private defendants are entitled to qualified immunity in section 1983 suits seeking damages on account of unconstitutional attachments. However, we modify our holding that the defendants here have not demonstrated that they are entitled to summary judgment on a claim of qualified immunity. Therefore, except for the statement of facts and our dis-

cussion regarding the availability of qualified immunity to private defendants in the circumstances presented here (that portion of the opinion encompassed by headnotes 5 and 6 at pages 1440-42, our prior opinion is vacated and the following discussion is substituted in its place.

[1] We now address whether the defendants here are entitled to prevail on their claim of qualified immunity. In Harlow v. Fitzgerald, 457 U.S. 800, 818-19, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982), the Supreme Court promulgated an objective standard for determining whether government officials, generally shielded from liability for civil damages, were entitled to qualified immunity in a particular case. The court held that such officials are, "shielded

from liability for damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[3/] As Harlow's emphasis on objective criteria suggests, the question of whether a statutory or constitutional right was clearly established at the time that the alleged wrong was committed is a question of law to be determined by the court. Mitchell v. Forsyth, 472 U.S. 511, 5236, 528 n. 9, 105 S.Ct. 2806, 2815-2816 n. 9, 86 L.Ed.2d 411 (1985); Joseph v. Brierton, 739 F.2d 1244, 1249 (7th Cir. 1984); Czurlanis v. Albanese, 721 F.2d 98, 108 and n. 8 (3d Cir. 1983); Trejo v. Perez, 693 F.2d 482, 488 (5th Cir. 1982). The appellants are thus entitled to de novo review on this issue.

Here the right at issue is a debtor's right to due process when his property is attached by a private creditor pursuant to state statute. Mr. Jones claims that in 1982 he had a clearly established right to notice and a hearing before the attachment of his property. We now analyze the relevant Supreme Court cases on this issue to determine whether this assertion is correct.

We turn first to Sniadach v. Family Finance Corporation of Bay View, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). In that case, the Supreme Court struck down a Wisconsin statute which authorized the prejudgment garnishment of wages, which the court noted were "a specialized type of property presenting distinct problems in our economic system." 395 U.S. at 340, 89 S.Ct. at 1822. The

suing creditor could garnish the debtor's wages without demonstrating a lien or prior interest in the property attached, and the attachment could be accomplished without judicial supervision. Holding that these safeguards were inadequate, the court found the statute unconstitutional for failure to provide pregarnishment notice and hearing to the debtor.

In its next treatment of this issue, a seven member court invalidated the replevin statute of Florida and Pennsylvania, which statutes authorized the sellers of goods to obtain repossession of their wares "without judicial order, approval or participation." The writ of replevin could be issued by a court clerk on "the bare assertion of the party seeking the writ that he is entitled to one." Fuentes v. Shevin, 407 U.S. 67, 74, 92

S.Ct. 1983, 1991, 32 L.Ed.2d 556 (1972). The court found both statutes further flawed because the only post-deprivation remedy granted to the debtor was the eventual opportunity to be heard as the defendant should the creditor commence an action to determine his rights to repossession. In light of these procedural inadequacies the court declared both statutes unconstitutional.

However, in Mitchell v. W.T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974), the court upheld a Louisiana sequestration statute which did not require that the debtor receive pre-seizure notice or hearing. The Mitchell court determined that when the debtor is provided with a variety of procedural safeguards which protect his interests, a sequestration or attachment statute is

not facially unconstitutional because it does not provide for preseizure notice or hearing. The court distinguished the Louisiana sequestration statute from those invalidated in Sniadach and Fuentes on several different grounds. First, under Louisiana state a writ of sequestration was available only to a creditor with a mortgage or lien in the property. Second, the statute authorized the writ, "only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts" shown by a verified petition or affidavit. Mitchell, 416 U.S. at 616, 94 S.Ct. at 1904. Further, in the specific district at issue, this requisite showing had to be made to a judge, so that "Mitchell was not at the unsupervised

mercy of the creditor and court functionaries." Id. The statute provided for, "judicial control of the process from beginning to end." Id. In addition, the statute provided that, "the defendant [debtor] by contradictory motion may obtain the dissolution of a writ of attachment or of sequestration, unless the plaintiff proves the grounds upon which the writ was issued." Id. at 622, 94 S.Ct. at 1907. The Supreme Court interpreted this provision as allowing for an immediate hearing to determine whether the writ was wrongfully issued. Id. at 618, 94 S.Ct. at 1905. Finally, the debtor was protected by a provision in the statute which allowed for damages for the wrongful issuance of a writ, and for attorney's fees, "whether the writ is dissolved on motion or after trial on the merits." Id. at 617, 94 S.Ct. at 1905.

The final link in this chain of cases came in the court's next term, when it invalidated a Georgia attachment statute which did not prove some of the procedural safeguards approved in Mitchell. The Georgia statute allowed a creditor to garnish property, absent a bond, via a writ of garnishment issued by a court clerk, with no guarantee that the writ could be challenged unless the debtor could file a bond to protect the plaintiff creditor. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 607, 95 S.Ct. 719, 722, 42 L.Ed.2d 751 (1974). The court in Di-Chem again reviewed those safeguards which had enabled the Louisiana statute in Mitchell to comport with the requirements of due process. It noted that under the Louisiana statute the creditor had a lien or prior interest

in the property; filed a bond to obtain the writ, was required to submit an affidavit, "clearly setting out the facts entitling the creditor to seek sequestration" to a judge; and was entitled to "an immediate hearing after seizure and to dissolution of the writ absent proof by the creditor of the grounds on which the writ was issued." Di-Chem, 419 U.S. at 607, 95 S.Ct. at 722.[4/] Finding these protections lacking, the court declared the Georgia garnishment statute unconstitutional, for failure to provide predeprivation notice and hearing.

Having carefully examined the Supreme Court pronouncement in this area, we cannot say as a matter of law that at the time Mr. Jones' cotton pickers were seized, a debtor was entitled to preseizure notice and hearing in all instances

of prejudgment attachment. Thus, we cannot say that the single fact that no preseizure hearing occurred means that the defendants here forfeit any claim to qualified immunity.

However, it is clear that by 1982 Supreme Court precedent had granted debtors certain clearly established due process rights upon the attachment of their property. By 1982 the fifth circuit had already determined that Mitchell and Di-Chem required that a prejudgment seizure be authorized by a judge who has discretion to deny issuance of the appropriate writ. Johnson v. American Credit Company of Georgia, 581 F.2d 526, 533-35 (5th Cir. 1978).[5/] Similarly, two readily apparent common threads run through all of the Supreme Court decisions outlined above. First, a debtor must be given the

opportunity to challenge the seizure in a prompt manner. Second, his financial interest must be protected in the event of a wrongful prejudgment attachment, either via the posting of a bond by the creditor who seeks the writ, or by allowing an action for damages suffered as a result of a wrongful attachment. Thus, while a right to a preseizure hearing was not "clearly established" by 1982, a reasonable person would have known that an attachment accomplished without the three procedural safeguards mentioned above was clearly unconstitutional.

Now we must determine whether the appellant's conduct violated these clearly established constitutional standards.[6/] After reviewing the record, and construing the facts in the light most favorable to Mr. Jones, we must conclude

that the actions of Preuit & Mauldin did not violate those rights of Mr. Jones which were clearly established at the time of seizure of his cotton pickers took place. P & M's actions were commensurate with the protections that were approved as adequate due process in Mitchell.[7/] First, P & M presented a sworn affidavit specifying the specific facts entitling P & M to an attachment of each picker. The affidavit indicated that Mr. Jones was justly indebted to P & M in a specific amount for labor and material furnished to a specific cotton picker; that Mr. Jones had failed to pay for the repairs after lawful demand; and that the attachment was not sued out for the purpose of vexing or harassing the debtor. Second, a state judge issued the writ, and retained "judicial control of

the process from beginning to end." Mitchell, 416 U.S. at 616, 94 S.Ct. at 1904. Third, the record indicates that service of the order of attachment and the complaint to enforce P & M's mechanic's lien was made upon Mr. Jones in a lawful manner. Fourth, P & M posted a bond, "to minimize the risk that the ex parte procedure [would] lead to a wrongful taking." Id. at 617, 94 S.Ct. at 1905. Finally, Alabama law gave Mr. Jones on opportunity to challenge the attachment in a timely manner.[8/] Thus, P & M's actions were not clearly unconstitutional, and the appellees are entitled to immunity from damages.

Appellants dispute the notion that Alabama law afforded Mr. Jones a reasonably prompt opportunity to challenge the attachment after execution of the writ.

We find that such a right did exist. As previously noted, P & M relied upon Alabama's mechanic's lien provisions in obtaining the writ of attachment. Alabama Code § 35-11-110 (1975) creates a lien in favor of a repairman against any vehicle he repairs. Alabama Code § 35-11-111 (1975) provides that any person entitled to a mechanic's lien may enforce it by obtaining a writ of attachment. Other than requiring a bond and an affidavit, § 35-11-111 does not lay out the procedure for obtaining the writ, however. The actual procedures for attachment are set out in a separate section of the Alabama Code, 6-6-40 et seq.[9/] As the district court noted, Ala. Code § 6-6-148 provides that:

> At any time within three years of the suing out of the attachment, before or after the action is determined, the de-

> fendant in attachment may commence an action on the attachment bond and may recover such damages as he has actually sustained if the attachment was wrongfully sued out and, if sued out maliciously as well as wrongfully, the jury may, in addition, give vindictive damages.

An action to challenge the attachment under section 6-6-148 may be brought by the debtor before, during, or after the action in which the debtor appears as a defendant. First National Bank v. Cheney, 120 Ala. 117, 23 So. 733 (1898); Liversage v. Gibson, 222 Ala. 672, 133 So. 715 (1931).[10/]

The only limitation with this remedy is that it only allows a debtor to challenge a "wrongful" attachment. However, in that sense it is exactly like the post-seizure remedy which was approved by the Supreme Court as constitutionally adequate in Mitchell. In Louisiana,

also, the debtor could challenge the writ "by contradictory motion unless the plaintiff proves the grounds upon which the writ was issued." [emphasis supplied]. This clearly allows only the opportunity to challenge wrongful attachment. In fact, the Alabama remedy is broader in that requiring the debtor to challenge the writ "by contradictory motion" may mean that the debtor may only do so while he is a defendant in the action brought by his creditor. Alabama provides a separate cause of action to the debtor, which may be used before, during, or after the action brought by the creditor.[11/]

Of course, in this case Mr. Jones failed to avail himself of this opportunity to challenge the attachment. However, the fact that he did not avail him-

self of the opportunity given to him under Alabama law does not effect our analysis. In the context of deciding whether these defendants were entitled to qualified immunity, we are deciding whether or not their actions were clearly unconstitutional. They did not obtain a writ under a statute which provided no opportunity to challenge the writ. Therefore, their actions did not violate this aspect of the debtor's constitutional rights.12/

[2] We hasten to point out that outside this context, the availability or nonavailibilty of a post deprivation remedy is only relevant to a section 1983 action where the deprivation takes place pursuant to a "random, unauthorized act," such that the complaint fails to state a claim under Parratt v. Taylor, 451

U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) and its progeny. Where, as here, the deprivation occurred as the result of an established state policy, the availability of the post-deprivation state remedy does not bar the availability of a section 1983 action. Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). Thus, in this case, while the existence of a post-deprivation remedy does not act to bar Mr. Jones' section 1983 action, the existence of a post-deprivaton remedy, in this context, helps to establish that the defendants are entitled to qualified immunity.13/

[3] To conclude, we find that P & M's actions did not violate clearly established constitutional rights of which a reasonable person would have

known.[14/] They are thus entitled to immunity from damages insofar as the seizure of Mr. Jones' cotton pickers without a hearing pursuant to Alabama Code § 35-11-111 may have violated Mr. Jones' constitutional rights.

[4] However, Mr. Jones' contentions do not rest solely on Preuit & Mauldin's invocation of Alabama's prejudgment attachment statute. He also claims, and this claim is supported by an affidavit of someone claiming to be an eyewitness, that an employee of Preuit & Mauldin attempted to "rig" the judicial sale which was held after Preuit & Mauldin obtained a default judgment against Mr. Jones for the money owed them for repairs on the cotton pickers. This claim, on its face, is wholly separate from any contention that the Alabama attachment law is uncon-

stitutional, or that Preuit & Mauldin's actions in obtaining a writ of attachment were unconstitutioanl. However, this separate, unidentified claim suffers from a fatal flaw. As the Supreme Court made clear in Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982):

> [Under § 1983] the party charged with deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

457 U.S. at 937, 102 S.Ct. at 2754.

Neither the complaint nor any document filed in district court asserts that the action allegedly undertaken by the employee of Preuit & Mauldin to dissuade another potential bidder from bidding on

the cotton pickers was undertaken in collusion with any state official who was overseeing the sale. Indeed, there is no assertion at all that the P & M employee who allegedly undertook to "rig" the sale was acting pursuant to, or under the color of, state law. Thus, this claim was also corrrectly dismissed by the district court for failure to meet the most basic requisites of a 1983 action.[15/]

Finally, we turn to Mr. Jones' contention that the district court abused its discretion in failing to declare Alabama's attachment statute unconstitutional on its face. The denial of a motion for summary judgment will be reversed only for an abuse of discretion. Johnson v. Bryant, 671 F.2d 1276, 1279 (11th Cir. 1982). The statute is constitutionally adequate in that it requires the

posting of a bond, Ala. Code §§ 6-6-45, 35-11-111, and because it affords an opportunity to challenge the writ, § 6-6-148. However, in the face of Johnson's holding that a writ of attachment must be issued by a judicial officer with authority to deny the writ, 581 F.2d at 534, Alabama's attachment statute may be constitutionally suspect to the degree that § 6-6-43 authorizes a nonjudicial officer to issue a writ of attachment.[16/]

[5] Nonetheless, in this case a judge issued the writ, not a clerk. Thus, P & M was not acting under, and Mr. Jones was not adversely affected by, that part of the statute which may be unconstitutional. Hence, Jones lacks standing to challenge that aspect of the law, and we do not hold it invalid.[17/] When a plaintiff is seeking a declaratory

judgment that a state statute is unconstitutional, the requirements for standing must be strictly enforced. See Griswold v. Connecticut, 381 U.S. 479, 481, 85 S.Ct. 1678, 1679, 14 L.Ed.2d 510 (1965). Nor do P & M forfeit their qualified immunity because a separate clause of the attachment statute may pose constitutional concerns.[18/]

In light of the foregoing discussion, we find the appellees were entitled to qualified immunity. On that basis the judgment of the district court is AFFIRMED.

JOHNSON, Circuit Judge, dissenting:

I agree with that majority's holding that Jones was entitled to preseizure notice and hearing only if P & M obtained the writs of attachment through a procedure that lacked the safeguards outlined

in Mitchell v. W.T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974). In Mitchell, the Supreme Court held that preseizure notice and hearing is not required if, in order to obtain a writ of attachment, the creditor must file an affidavit setting forth the specific facts entitling him to relief; if the creditor must post a bond to compensate the debtor for any damages resulting from a wrongful attachment; if the writ of attachment can be issued only by a judge with discretion to deny the writ; and, if the debtor is entitled to an immediate postseizure hearing at which the creditor must prove his entitlement to the writ. I disagree, however, with the majority's conclusion that those safeguards were present here. Specifically, I believe that the judge who issued the

writ was not vested with sufficient discretion to satisfy the dictates of Mitchell. Therefore, I would hold that Jones was entitled to preseizure notice and hearing and thus that the attachments violated his clearly established constitutional rights.

The judge who issued the writs of attachment here could not inquire into the veracity of P & M's allegations. As the majority indicates, the attachments here were obtained under Alabama's mechanic's lien statute. Alabama Code § 35-11-1110 creates a lien in favor of a repairmen against any vehicle he repairs, and Alabama Code § 35-11-111 outlines the procedures for enforcing that lien by attachment. Although Section 35-11-111 requires both the filing of an affidavit setting forth the plaintiff's entitlement

to relief and the posting of a bond payable to the defendant in case of a wrongful attachment, that section does not specify who is authorized to issue the writ. Instead, it provides only that the writ is to be issued "by any officer authorized to issue such writs." Id. Therefore, in order to determine who can issue such a writ and what discretion the issuing officer possesses, resort must be had to the provision of Alabama's general attachment statute. Those provisions authorize a circuit court judge to issue a writ of attachment. Ala. Code § 6-6-43. However, nothing in those provisions authorizes a circuit court judge to go behind a creditor's allegations in order to determine their validity. In actions involving either the seizure of property under the detinue statute or the enforce-

ment of a security interest, Ala. R. Civ. P. 64(b) mandates a judicial inquiry into the facts supporting the need for an attachment without prior notice. However, both Rule 64 and its Committee Comments indicate that the special procedures established therein apply only to actions in detinue or in enforcement of a security interest and that those procedures are in addition to the procedures required under the general attachment statute.[1/] Consequently, in issuing a writ of attachment under Section 35-11-111, the circuit court judge's function is solely to determine the adequacy of the plaintiff's allegations. If the facts as alleged would entitle the plaintiff to relief, the judge must issue the writ. He cannot determine whether the allegations are in fact true.

Such limited "discretion" fails to provide the meaningful judicial participation contemplated in Mitchell. The safeguards outlined in Mitchell are a substitute for prior notice and hearing because, like preseizure notice, they protect debtors against "abuse by creditors without valid claims." 416 U.S. at 614. Therefore, judicial participation in issuing a writ of attachment does not provide a substitute for preseizure notice unless that participation helps "minimize the risk that the ex parte procedure will lead to a wrongful taking." Id. at 617, 94 S.Ct. at 1905. Judicial participation does not meaningfully reduce the risk of wrongful attachment unless the judge can, if necessary, inquire into the truthfulness of the creditors allegations. Otherwise the judge's in-

volvement would amount to nothing more than the very type of ministerial determination that the Supreme Court has struck down as insufficient to provide due process when performed by a clerk. See North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975). This is not to say, however, that a judge must put every creditor to his proof or that a crditor, prior to issuance of a writ of attachment, must prove his claim by a preponderance of the evidence. Rather, the judge must possess the ability, in the exercise of his discretion, to require more proof from the creditor than the creditor's affidavit in deciding whether to issue a writ of attachment without out prior notice to the debtor. For example,

wish to examine the documents giving rise to the creditor's interest in the property. If such proof is not forthcoming, the judge should be able to deny issuing the writ until the debtor is provided notice and an opportunity for a hearing.

The majority reads Mitchell as requiring no more from the judge than that he determine the facial sufficiency of the allegations. They base their reading on the ground that the state sequestration statute upheld in that case allowed the judge to issue the writ "only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts shown by verified petition or affidavit." 416 U.S. at 616, 94 S.Ct. at 1904. However, nothing

in that statute prohibited the court from requiring additional proof. Furthermore, the Court emphasized in Mitchell that a preseizure hearing was unnecessary because the issues involved in that case -- the existence of a vendor's lien and the purchaser's default -- were particularly suited for documentary proof. Id. at 617-18, 94 S.Ct. at 1905. That a claim is amenable to documentary proof helps reduce the risk of a wrongful attachment only if the court issuing the writ can examine any supporting documents. Therefore, I do not read Mitchell as narrowly as the majority does. Consequently, I believe that the attachments here violated Jones's clearly established constitutional rights. Furthermore, I adhere to the remainder of the original panel opinion and believe that the award of

summary judgment in favor of the defendants should be reversed.

APPENDIX D FOOTNOTES

* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

1/ The facts of this case are set out in the panel opinion Jones v. Preuit & Mauldin, 808 F.2d 1435 (11th Cir. 1987).

2/ Eleventh Circuit Rule 26(f) provides:

> A suggestion for rehearing en banc will also be treated as a petition for rehearing before the original panel.

Rule V.C.b(1) of our Internal Operating Procedures provides:

> The panel has control P.H.C. - although a copy of the suggestion for rehearing en banc is distributed to each panel judge and every active judge of the court, the filing of a suggestion for rehearing en banc does not take the case out of plenary control of the panel deciding the case. The panel may, on its own, grant rehearing and may do so without action by the full court.

3/ The court further held that, once it is determined that the right was clearly established, "if the official pleading the [qualified immunity] defensive claims extraordinary circumstances and can prove that he neither knew or should have known of the relevant legal standard, the de-

fense should be sustained. But again, the defense would turn primarily on objective factors."

This seems to allow a small margin of subjectivity in "extraordinary circumstances." The court did not attempt to define what "extraordinary circumstances" it had in mind. However, we do not fnd the subjectivity element relevant here, as seeking a writ of attachment is not normally a "extraordinary" event.

4/ The opinion of the court in Di-Chem was a four-justice pluarlity. Justice Powell concurred in the judgment, explaining that,

> I am not in accord with the Court's suggestion that the Due Process Clause might require that a judicial officer issue the writ of garnishment. . . . When combined with the availability of the garnishor's bond to compensate for any harm caused, the possibility of prompt correction of possible error suffices to satisfy the requirement of procedural due process in this context.

Id., 419 U.S. at 611, n. 3, 95 S.Ct. at 725, n. 3 (Powell, J., concurring).

Thus, the opinion produced a majority which felt that the posting of a bond and the opportunity to initiate a prompt post seizure hearing were essential requirements of due process.

5/ The Eleventh Circuit has adopted as precedent all decisions of the forner Fifth Circuit rendered prior to October 1, 1981. Bonnor v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1983).

6/ On this issue also, because we are reviewing an order granting summary judgment, we must independently review the facts relied uon by the district court in determining that qualified immunity was available. Morrison v. Washington County, Alabama, 700 F.2d 678 (11th Cir. 1983).

7/ In evaluating P & M's conduct, we are concerned only with whether their action were clearly unconstitutional with respect to the prejudgment seizure of the cotton pickers. This harmed Mr. Jones only insofar as he lost use of the pickers prior to judgment. The ultimate, permanent loss of the pickers occurred pursuant to a judicial sale undertaken to execute a lawfully entered default judgment. The prejudgment seizure is not related to the ultimate loss. Section 35-11-111 allows one with a mechanic's lien to obtain a writ of attachment. A.R.C.P. 64(a) authorizes a prejudgment attachment, "for the purpose of securing satisfaction of the judgment ultimately to be entered in the action. . . ." However, there is no reason why P & M could not have obtained a judgment, then obtained a writ of attachment, then sold the pickers. Mr. Jones is only challenging the procedures for prejudgment attach-

ments, which do not authorize the final disposal of the property.

8/ It is important to note that nothign in the Supreme Court's opinion in Mitchell required that the judge issuing the writ have the authority to determine the veracity of the creditor's allegations. Under the Louisiana statute upheld in Mitchell, the judge issued the writ "if the nature of the claim and the amount thereof, if any, and the ground relied upon for the issuance of the writ clearly appear from specific facts shown by verified petition or affidavit." Id. at 616. Our reading of Mitchell requires that the issuing judge be convinced that if what the creditor alleges is true, the creditor is entitled to a writ of attachment. The judge must have the authority to make sure that the affidavit alleges the necessary grounds for issuing the writ. Requiring any further investigation at that point would vitiate Mitchell and essentially require a pre-seizure hearing in every case, which is plainly not required. Further, as in Mitchell where the attachment was based on a vendor's lien, the specific facts necessary to establish grounds for a mechanic's lien are easily established by documentary proof, thus decreasing the likelihood that a seizure will prove to have been a mistake. See Mitchell, 416 U.S. at 612, 95 S.Ct. at 725.

9/ The parties have spent a good deal of their effort on appeal arguing over

whether Alabama Rule of Civil Procedure 64(b) applies. This rule provides that a defendant may obtain a prejudgment (as opposed to a preseizure) hearing on the issue of dissolution of a writ of attachment if the debtor serves a written request on counsel for the creditor within five days from the date of seizure of the property. The district court erred in deciding that 64(b) was applicable to this case.

By its terms, Rule 64(b) applies only to actions in detinue and to actions "whereby the owner of a security interest in personal property seeks to recover possession of said personal property prior to judgment for ...." P & M's actions did not fall into either category. Detinue is an action for the recovery of personal property wrongfully detained. Ivey v. Verbeck, 461 So.2d 813, 815-16 (Ala.Civ.App.1984). P & M sought payment of repair bills; therefore its actions were in debt, not detinue. Foshee v. General Telephone Company of the Southeast, 295 Ala. 70, 322 So.2d 715, 717 (1975). Nor did P & M's actions satisfy the second category, for P & M lacked an enforceable security interest in the cotton pickers. A security interest is not enforceable and does not attach unless either the secured party is in possession of the collateral or the debtor has signed a security agreement that contains a description of the collateral. Ala.Code § 7-9-203 (1975). P & M had neither possession of the cotton pickers not a security agreement signed by Jones. Therefore, P & M could not

have proceeded under Rule 64(b). Cf. Ex Parte Martin, 412 So.2d 815, 8178 (Ala.Civ.App. 1982) (extra procedural protections available under Rule 64(b) do not apply to statutory landlord's liens created under Alabama code §§ 35-9-60 through 65).

This does not end the inquiry, however. Just because Mr. Jones was not entitled to a prompt hearing under the elaborate procedures laid out for detinue and security interests in Alabama Rule of Civ.P. 64(b) does not mean that Alabama law did not provide him with a perfectly adequate opportunity to challenge the writ under Ala.Code § 6-6-148, as explained above.

10/ A.R.C.P. 65.1 also gives litigants the right to challenge writs that are wrongfully executed, and Mr. Jones did file such a claim, post judgment, which was denied by Judge Burney on Nov. 29, 1983.

11/ Appellant seems to concede that A.R.C.P. 64(b) provides an adequate opportunity to challenge a writ, yet never explains why 64(b) provides more than an opportunity to challenge a "wrongful" attachment.

12/ Appellant also claims that while the attachment order was being carried out, one of the cotton pickers accidentally fell off a truck and was damaged, thereby

decreasing the amount Jones could obtain for it at the judicial sale. Such negligent acts do not support a cause of action under § 1983. Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662, 665 (1986).

13/ We find the defendant's argument that they did not act pursuant to an established state policy to be totally without merit. However, given our disposition of the case, we need not address the issue in more detail. Nor do we express an opinion on P & M's arguments regarding waiver, res judicata or respondeat superior.

14/ P & M also argues that they are immune because their actions preceded the Supreme Court's decision in Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), wherein the court held that private actors who invoked presumptively valid attachment statutes were "state actors" for the purpose of making out a § 1983 claim. Given our disposition of the case regarding the substance of P & M's actions, we need not reach this issue.

15/ The affidavit containing this assertion was filed by itself, unconnected to any document. We construe it as an attempt to avoid summary judgment by creating an issue of material fact. On appeal Jones attempts to relate this to P & M's "good faith." However, good faith

in carrying out the sale (under Ala.Code § 8-1-100 which forbids arranged bidding) is unrelated to the attachment claim, and the claim regarding the sale falls for failure to show state action.

16/ This section reads:

> In the first and second cases mentioned in section 6-6-41 [where a defendant lives out of state or absconds] an attachment may be issued by any judge of the circuit court, returnable to any county in the state, or by the clerk of the circuit court, judge of probate or any district court judge, within their respective counties; in the third and fourth cases, only by a judge of the circuit court or judge of probate, returnable to any county.

17/ Under Alabama code § 6-6-143 a judge must permit the plaintiff to amend any defect of form of substance in an affidavit, bond or attachment. However, we have not discovered any Alabama law which indicates that the reviewing court must allow a questionable writ to go forward. Thus, we conclude that Alabama law does not suffer from the same flaw which rendered the Georgia attachment statute unconstitutional in Johnson. In Georgia, a judge, magistrate, justice of the peace, or clerk of any court of record, when presented with a creditor's affidavit and

bond, had the "duty" to issue an attachment against the defendant. Johnson 581 F.2d at 534. We find nothing in Alabama law to indicate that the issuing officer's discretion is so limited.

18/ Mr. Jones also intimates that the Alabama statute is unconstitutional because it allows seizure without a showing that the proerty to be seized is in imminent danger of destruction. However, in Mitchell, the Louisiana statute which was approved as constitutional did not require that the party seeking the writ make such a showing. All that statute required was that it be "within the power" of the defendant to dissipate or move the assets sought to be seized. 416 U.S. at 623, 94 S.Ct. at 1907. Proof of imminent dissipation is clearly not a constitutional prerequisite for attachment.

1/ As the majority notes, supra note 9, P & M's action to enforce its mechanic's lien did not constitute either an action in detinue or an action to enforce a security interest. Therefore, P & M could not have proceded under Rule 64(b).

APPENDIX E

Samuel JONES, Jr.,
Plaintiff-Appellant,

v.

PREUIT & MAULDIN, a partnership composed of E. F. Mauldin, individually, and E. F. Mauldin as Executor or Administrator of the Estate of Leonard Preuit, Deceased;
E.F. Mauldin;
E.F. Mauldin as Executor or Administrator of the Estate of Leonard Preuit, Deceased; and
Preuit & Mauldin,
Defendants-Appellees.

No. 86-7415-1.

United States Court of Appeals,
Eleventh Circuit.

Nov. 24, 1987.

Appeal from the United States District Court for the Northern District of Alabama.

Before RONEY, Chief Justice, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK and EDMONDSON, Circuit Judges.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC
(Opinion July 24, 1987, 11th Cir., 1987, 822 F.2d 998)

BY THE COURT:

A member of this court in active service having requested a poll on the appliction for rehearing in banc and a majority of the judges of this court in active service having voted in favor of granting a rehearing in banc,

IT IS ORDERED that the above cause shall br reheard by this court in banc with oral arugment during the week of February 22, 1988, on or hereafter to be fixed. The clerk will specify a briefing schedule for the filing of in banc briefs. The previous panel's opinion is hereby VACATED.

APPENDIX F

Samuel JONES, Jr.,
Plaintiff-Appellant,

v.

PREUIT & MAULDIN, a partnership composed of E. F. Mauldin, individually, and E. F. Mauldin as Executor or Administrator of the Estate of Leonard Preuit, Deceased; E.F. Mauldin as Executor or Administrator of the Estate of Leonard Preuit, Deceased; and Preuit & Mauldin,
Defendants-Appellees.

No. 86-7415.

United States Court of Appeals,
Eleventh Circuit.

Aug. 10, 1988.

Action was brought under § 1983 for wrongful attachment. The United States District Court for the Northern District of Alabama, 586 F. Supp. 1563, dismissed and appeal was taken. The Court of Appeals, 763 F.2d 1250, reversed and remanded, and the District Court, 634 F. Supp. 1520, No. CV84-AR-5131-NW, Wil-

liam M. Acker, Jr., J., entered summary judgment in favor of creditors. On appeal, the Court of Appeals, 808 F.2d 1435, affirmed in part and reversed in part. On petition for rehearing, the Court of Appeals, 822 F.2d 998, affirmed. On petition for rehearing and suggestion for rehearing in bank, the previous panel opinion was vacated, 833 F.2d 1436. The Court of Appeals, Hill, Circuit Judge, held that: (1) defendants were entitled to defense of qualified immunity in wrongful attachment action under § 1983, unless defendants reasonably should have known that their actions violated clearly established constitutional rights, and (2) creditors were entitled to defense of qualified immunity in wrongful attachment action under § 1983.

Affirmed.

Tjoflat, Circuit Judge, concurred specially and filed opinion.

Vance, Circuit Judge, dissented and filed opinion.

Johnson, Circuit Judge, dissented and filed opinion in which Vance, Kravitch, Hatchett, and Clark, Circuit Judge, joined.

1. Civil Rights

Private defendants were entitled to defense of qualified immunity in wrongful attachment actions under § 1983, unless defendants reasonably should have known that their actions violated clearly established constitutional rights. 42 U.S.C.A. § 1983.

2. Civil Rights

Creditor was entitled to qualified immunity in wrongful attachment suit brought under § 1983; creditor acted in

good faith in proceeding under Alabama attachment statutes and should not reasonably have known that its actions violated debtor's clearly established constitutional rights. 42 U.S.C.A. § 1983.

3. **Constitutional Law**

Debtor lacked standing to challenge allegedly constitutionally offensive provision of Alabama attachment statute insofar as Alabama statute authorized nonjudicial officer to issue writ of attachment as creditor presented its application to circuit court judge, and judge authorized issuance of writs of attachment against debtor's equipment; debtor was not affected by allegedly unconstitutional portion of law. Ala. Code 1975, § 6-643.

4. **Constitutional Law**

When plaintiff seeks declaratory judgment that state statute is unconsti-

tutional, requirements for standing must be strictly enforced.

5. **Federal Courts**

Court of Appeals may not declare law unconstitutional based on hypothetical situation which has not, in fact, occurred.

Burr & Forman, C.V. Stelzenmuller, F.A. Flowers, III, Birmingham, Ala., for plaintiff-appellant.

Potts, Young, Blasingame & Putnam, Robert W. Beasley, Florence, Ala., Don Siegelman, Atty. Gen. of Ala., Ronald C. Forehand, Asst. Atty. Gen., Montgomery, Ala., Robert M. Weinberg, Bradley, Arant, Rose & White, David G. Hymer, Donald M. James, Birmingham, Ala., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Alabama.

Before RONEY, Chief Judge, and TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK, EDMONDSON and COX, Circuit Judges.

HILL, Circuit Judge:

This case involves the question of whether qualified immunity may be asserted by private individuals who are defendants in an action under 42 U.S.C. § 1983, and, if so, whether the defendants in this case are entitled to qualified immunity. A panel of this court issued an original opinion on rehearing, 822 F.2d 998 (1987). The two opinions concluded that qualified immunity is available to such defendants, but, on disposition of the case, came to different results. We have taken the case *in banc* to examine and resolve the issues. We find that private individuals may assert a good faith immunity defense in a section 1983 action, and that these defendants have established a claim to such immunity.

I. FACTS

Samuel Jones, the plaintiff, was a cotton farmer in Alabama in 1981. He produced his own crop and, using his mechanical cotton picking equipment, harvested cotton for others. In July of that year, Jones employed Preuit & Mauldin (P & M) to repair three of his cotton pickers. P & M deals in and services International Harvester cotton pickers. The total cost of the repairs was over $10,000, and Jones represented that he would pay for the repairs out of the proceeds from his harvesting work during the coming fall season.

In February of 1982, the repair bill had not been paid, in part because Jones also owed money to the Farmers Home Administration (FHA) and checks he received for his cotton were made out jointly to

Jones and the FHA. After repeated efforts to have Jones pay, P & M's manager, Preuit Mauldin, contacted an attorney, D. L. Martin, about the possibility of collecting on the debt.

Alabama law provides equipment repairs with a mechanic's lien against vehicles upon which they perform work. Ala. Code § 35-11-110 (1975). Equipment of the kind involved here is subject to such a lien. P & M's attorney thus prepared documents and pleadings necessary to file an action to foreclose the liens asserted by P & M against Jones' three cotton pickers. In addition, he prepared an appliction for writs of attachment as provided for under Alabama law. Ala. Code § 35-11-111. The pleadings and documents named Jones' other creditors as involuntary plaintiffs because they had

potential interests in the cotton pickers.[1/]

On February 15, 1982 P & M filed three separate actions in the Circuit Court of Laurence County, Alabama to foreclose on the mechanic's liens against Jones' three cotton pickers. At the same time P & M filed the affidavits for attachment of the equipment and bonds to secure Jones against a wrongful attachment. It is not disputed that the attachment proceedings were in conformity with Alabama law. While the state law appears to allow a clerk of court to issue the writ of attachment (Ala. Code § 6-643), these affidavits were presented to the judge of the circuit court, who authoriized the issuance of a writ for each of the three pieces of equipment.

Jones was served with process in the lien foreclosure actions on April 8, 1982 and, on the same day, the writs of attachment were executed upon the equipment which was thereafter stored by the sheriff. Further, on that day, two of the involuntary plaintiffs filed a motion for dissolution of the writ and requested a hearing. Jones did not join in this motion.[2/] Jones also failed to respond to the summons and complaint in the three foreclosure actions, and a default judgment was entered against him on May 19, 1982.[3/]

The circuit court held a hearing on the involuntary plaintiffs' motion for dissolution on June 15, 1982. The hearing involved the relative priority of P & M's liens as against the claims of the other, involuntary, plaintiffs.

Jones did not appear as an interested party at the hearing, but, as a witness, he testified for Citizens Bank as to the bank's interest in his equipment. His testimony supported the bank's position. On July 2, 1982 the judge denied the motion for dissolution,[4] confirmed the default judgments, and ordered the cotton pickers sold. The equipment was ultimately sold at auction on September 13, 1982.

Jones first took formal action as a party in court in this case on August 16, 1983 when he filed a motion pursuant to Rule 65.1 of the Alabama Rules of Civil Procedure seeking a forfeiture of P & M's attachment bond.[5] He alleged that the attachment was wrongful, vexatious, and without legal authority. A hearing was held, and the motion was denied on Novem-

ber 29, 1983. Jones apparently took no further action in state court.[6/]

Jones filed the present action in federal district court on February 24, 1984. In his complaint under 42 U.S.C. § 1983 Jones alleged that the pre-judgment seizure of his cotton pickers violated his rights under the due process clause of the Fourteenth Amendment. The district court intitially dismissed the suit as barred by the applicable statute of limitations, but a panel of this court reversed that decision. 763 F.2d 1250 (11th Cir. 1985). Subsequently, Jones moved for partial summary judgment seeking a declaration that the Alabama attachment procedure was unconstitutional. The defendants then moved for summary judgment of Jones' section 1983 claims. The district court denied Jones'

motion and granted summary judgment in favor of the defendants.

II. DISCUSSION

A. Qualified Immunity

[1] The district court found that P & M acted in good faith reliance upon laws which were not clearly unconstitutional. This finding raises the question of whether private defendants in a section 1983 action are entitled to assert the defense of qualified immunity. If they are, private defendants would be free from liability "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." Anderson v. Creighton, ___ U.S. ___, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987). Stated otherwise, immunity attaches unless that defendants reasonably should

have known that their actions violated clearly established constitutional rights. Harlow v. Fitzgerald, 457 U.S. 800, 818-819, 102 S.Ct. 2727, 2738-39, 73 L.Ed.2d 396 (1982). The Supreme Court held that private defendants may be subject to liability under section 1983 in Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). The Court, however, expressly reserved the question of whether such defendants are entitled to qualified immunity. Id. at 942 n. 23, 102 S.Ct. at 2756 n. 23.[7/] We find that private defendants are entitled to a defense of qualified immunity in wrongful attachment actions under section 1983.

While section 1983 itself is silent as to immunities, the Supreme Court has held that the provision incorporates im-

munities which were well established at common law and which are consistent with the purposes of the statute. Owen v. City of Independence, 445 U.S. 662, 638, 100 S.Ct. 1398, 1409, 63 L.Ed.2d 673 (1980); Pierson v. Ray, 386 U.S. 547, 554-55, 87 S.Ct. 1213, 1217-18, 18 L.Ed.2d 288 (1967).[8/] Thus, we must determine whether the good faith reliance on law claimed here was well established as a defense at common law and whether strong policy reasons support its application in section 1983 actions. Two of our fellow circuits have undertaken this analysis and have held that qualified immunity attaches to private defendants under section 1983. See Butler v. Buechler, 706 F.2d 844, 850-53 (8th Cir. 1983); Folsom Investment Co. v. Moore, 681 F.2d 1032, 1037-38 (5th

Cir. Unit A 1982). Two other circuits have held that private defendants are not entitled to qualified immunity. See Downs v. Sawtelle, 574 F.2d 1 (1st Cir.), cert. denied, 439 U.S. 910, 99 S.Ct. 278, 58 L.Ed.2d 255 (1978); Howerton v. Gabica, 708 F.2d 380, 385 n. 10 (9th Cir. 1983).

At the time of section 1983's enactment, the common law provided an action for the tort of malicious prosecution, which was used as a remedy for wrongful attachment. Some jurisdictions also recognized an independent tort of wrongful attachment. The plaintiffs in such suits were required to prove that the attachment proceedings had been instituted by defendants with malice and without probable cause. Buller, 706 F.2d at 851; Folsom Investment Co., 681 F.2d at 1038.

See also W. Prosser, Handbook of the Law of Torts, § 120 (4th ed. 1971). By requiring proof of malice and lack of probable cause as an element of the claim, the common law recognized a defense of good faith and probable cause in wrongful attachment suits. The Supreme Court has held that the existence of a defense of good faith and probable cause at common law supports the availability of qualified immunity in present day section 1983 suits. See Wood v. Strickland, 420 U.S. 308, 318-19, 95 S.Ct. 992, 999, 43 L.Ed.2d 214 (1975) (liability of public school officials under state tort law for malicious acts only establishes good faith immunity under section 1983); Pierson, 386 U.S. at 555-57, 87 S.Ct. at 1218-19 (police officers entitled to good faith immunity under section 1983 where

good faith and probable cause were a defense in common law suits for false arrest or false imprisonment). Thus, the existence of a good faith and probable cause defense in common law action for wrongful attachment supports a finding that qualified immunity is available to a private defendant in a section 1983 suit.

We turn then to the policy reasons supporting the availability of qualified immunity. Public officials have been accorded immunity in order to ensure a willing supply of public servants. Similarly powerful policy considerations support granting qualified immunity to private individuals in wrongful attachment suits. When a citizen undertakes in good faith to utilize a proceeding at law provided by his state legislature, he should to so with confidence that he need not

fear liability resulting from the legislature's constitutional error of which he was unaware. Indeed, our system encourages citizens to employ existing lawful mechanisms to resolve their claims and disputes. What we encourage we ought not seek to punish. In the same way that we wish to encourage citizens to undertake public service, so must we encourage them to settle their differences and assert their claimed rights through the employment of legal mechanisms which they believe, in good faith, are constitutional.

The opportunity to employ extant legal procedures is not, however, without limits. The available immunity is thus qualified by the requirement that the defendant must act in good faith. More specifically, in the present context the

defendant is immune unless he knew or reasonably should have known that his actions violated clearly established constitutional rights. This qualification preserves the full deterrent force of section 1983 by excluding from liability only those who could not reasonably have known that their conduct violated the federal constitution. No additional deterrence can be achieved by punishing individuals who could not reasonably have known that their actions were improper. Moreover, when an individual takes action that he should have known violated constitutional rights, the individual is not immune. We thus find that strong policy considerations support the availability of qualified immunity for private defendants.

Providing private citizens with qualified immunity is also supported by the general development of section 1983 law. Prior to Lugar, the elements of a 1983 claim and the available defenses were addressed in terms of state officers, agents, or employees as defendants. The Supreme Court found that such public defendants were entitled to various types of immunity. See e.g., Wood, 420 U.S. at 318-19, 95 S.Ct. at 999; Pierson, 386 U.S. at 555-557, 87 S.Ct. at 1218-19. Section 1983 provides for claims to redress only state action, and prior to Lugar thus represents a significant change in the course of section 1983 law in that it renders private citizens liable as state actors for constitutional violations. The holding in Lugar is premised, however, on the finding that, in

certain circumstances, private individuals may be equated with public actors for section 1983 purposes. Since Lugar rests on the premise that private and public actors may sometimes be equated, there is little reason to deny to private defendants the type of immunity which has been granted to public defendants. Indeed, the logic of Lugar compels the conclusion that while private individuals may sometimes be liable equally with public defendants under section 1983, they should never be held more liable. To deny private individuals such immunity as public actors enjoy would render private individuals more liable than public actors. This result would be inconsistent with Lugar. We therefore hold that private defendants are entitled to qualified immunity in wrongful attachment suits under section 1983.[9/]

B. P & M's Qualified Immunity

[2] Having determined that private defendants are entitled to qualified immunity in wrongful attachment actions under section 1983, we must now address whether P & M acted in good faith and is therefore not liable. More specifically, our inquiry is whether P & M reasonably should have known that its actions violated Jones' clearly established constitutional rights. This inquiry requires an objective analysis of the law as it existed at the time of P & M's action. See Anderson, 107 S.Ct. at 3038 (The inquiry "turns on the 'objective legal reasonableness' of the action."). It is therefore a question of law.

Jones contends that in 1982 he had a clearly established right to notice and a hearing before his property could be at-

tached. In addressing this contension we must evaluate the constitutional jurisprudence extant at the time that his property was attached. There were four Supreme Court cases on the books in 1982 dealing directly with the constitutionality of attachment provisions.

In Sniadach v. Family Finance Corporation of Bay View, 395 U.S. 337, 340, 89 S.Ct. 1820, 1822, 23 L.Ed.2d 349 (1969), the Supreme Court struck down a Wisconsin statute which authorized the prejudgment garnishment of wages, which the court noted were "a specialized type of property presenting distinct problems in our economic system." The statute did not provide for pregarnishment notice of hearing. Furthermore, the creditor could garnish the debtor's wages without demonstrating a lien or prior interest in the

property atttached, and the attachment could be accomplished without judicial supervision. In the absence of more restrictive safeguards, the Court held the statute unconstitutional for failure to provide pregarnishment notice and a hearing.

The Supreme Court then struck down the replevin statutes of Florida and Pennsylvania in Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). These provisions suffered from several fatal inadequacies. First, they authorized a seller of goods to obtain repossession of their wares without judicial order or participation. Second, the writ could be issued by a court clerk on "the bare assertion of the party seeking the writ that he is entitled to one." Id. at 74, 92 S.Ct. at 1991. And

finally, the debtor's only post-deprivation remedy was the potential to be heard as the defendant if the creditor commenced an action to determine his rights to repossession. Given these procedural inadequacies, in addition to the absence of preseizure notice and a hearing, the court declared both statutes unconstitutional.

The pathway along which the Supreme Court had been travelling in Sniadach and Fuentes took an abrupt turn when, in Mitchell v. W.T. Grant co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974), the Court upheld a Louisiana sequestration provision which allowed attachment without preseizure notice or a hearing. The opinion so limited the principles enunciated in Fuentes that several Justices concluded that Fuentes was es-

sentially overruled. See 416 U.S. at 623, 94 S.Ct. at 1908 (Powell, J., concurring)("I think it fair to say that the Fuentes opinion is overruled."); 416 U.S. at 635, 94 S.Ct. at 1913 (Stewart, J., dissenting)("[T]he court today has unmistakably overruled a considered decision of this court that is barely two years old, without pointing to any change in either societal perceptions or basic constitutional understandings that might justify this total disregard of stare decisis."). Nevertheless, the court distinguished the Louisiana provision from the statutes struck down in Fuentes, and found that the Louisiana law was redeemed by several alternatives safeguards. First, the writ of sequestration was authorized "'only when the nature of the claim and the amount thereof, if any, and

the grounds relied upon for the issuance of the writ clearly appear from specific facts' shown by verified petition or affidvait." Mitchell, 416 U.S. at 616, 94 S.Ct. at 1904. Second, in the particular district involved, the requisite showing had to be made to a judge, and only a judge was authorized to issue the writ. Id. Third, the statute provided that "]t]he defendant by contradictory motion may obtain the dissolution of a writ of attachment or of sequestration, unless the plaintiff proves the grounds upon which the writ was issued." Id. at 622, 94 S.Ct. at 1907. The Supreme Court interpreted this section to provide for an immediate hearing to determine whether the writ was appropriately issued. Id. at 618, 94 S.Ct. at 1905. Finally, the debtor was protected by a provision in

the statute which allowed for damages for wrongful issuance of the writ, and for attorneys' fees, "whether the writ is dissolved on motion or after trial on the merits." Id. at 617, 94 S.Ct. at 1905.[10/]

In the fourth Supreme Court case, North Georgia Finishing v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975), the court struck down a Georgia attachment statute which did not provide several of the safeguards approved of in Mitchell. First, the Georgia law provided the following with respect to the affidavits: "[t]he writ of garnishment is issuable on the affidavit of the creditor or his attorney, and the latter need not have personal knowledge of the facts. The affidavit, like the one filed in this case, need only contain

conclusory allegations." Id. at 607 (citation omitted). Second, the writ could be issued by a court clerk without judicial participation. Id. Finally, the debtor could dissolve the garnishment only by filing a bond to protect the creditor, and there was no provision for a prompt post-seizure hearing at which the creditor would be required to demonstrate the grounds upon which the writ was issued. Id. Without such alternative safeguards, the statute was held unconstitutional for failure to provide pre-seizure notice and a hearing.

Having traversed this somewhat tangled trail of Supreme Court cases, we cannot say that P & M should have known that it was violating any clearly established constitutional rights. The Supreme Court justices themselves

strained to reconcile Fuentes, Mitchell and Di-Chem, and in a case such as the present one, where the creditor's actions fall somewhere in the interstice, a reasonable person would have been hard put to identify any clearly established constitutional rights or violations. As the Supreme Court has stated, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, ... but it is to say that in light of pre-existing law the unlawfulness must be apparent." Anderson, 107 S.Ct. at 3039. Under a qualified immunity analysis, of course, we need not rule upon the actual

constitutional validity or invalidity of the creditor's actions or of the state statute under which he proceeded. We need only examine whether the creditor should have known that the actions violated clearly established constitutional rights. Thus, so long as P & M's actions were arguably commensurate with the protections approved of in Mitchell, P & M is entitled to good faith immunity.

P & M's actions included the following. First, P & M presented a sworn affidavit indicating the specific facts entitling P & M to an attachment of Jones' equipment. The affidavit was made upon personal knowledge and it indicated that Jones was justly indebted to P & M in a specific amount for labor and materials; that Jones had failed to pay for the repairs after lawful demand; and that

the attachment was not for the purpose of vexing or harassing Jones. Second, P & M presented the applications to a judge and it was the judge who authorized the writ. Third, Jones was properly served and notified of the attachment. Fourth, P & M posted bonds to protect Jones against loss due to wrongful attachment. Finally, Alabama law provided Jones with an opportunity to challenge the attachment in a timely manner.[11/] Based upon this record, we cannot say that P & M should have known that its actions violated Jones' clearly established constitutional rights. P & M's efforts were arguably commensurate with the safeguards required by Mitchell. At best, one may argue that P & M's actions fall somewhere in the nebulous area that lies between Mitchell and Di-Chem. In either case, however, a

reasonable person could have believed that the actions were constitutional. We do not hold that P & M's actions were constitutional, but only that the actions did not violate clearly established constitutional rights of which a reasonable person should have known. P & M is thus entitled to immunity insofar as the seizure of Jones' cotton may have violated his constitutional rights.[12]/

C. Declaratory Relief

[3] Jones also moved the district court for a partial summary judgment declaring the Alabama attachment statute unconstitutional. The district court denied the motion, and Jones now contends that this was an abuse of discretion. We readily agree with Jones that the Alabama statute stands on highly questionable constitutional footing insofar as it au-

thorizes a nonjudicial officer to issue a writ of attachment. See Ala. Code § 6-6-43.[13/] This authorization may indeed be contrary to Mitchell's mandate that judicial control exist in order "to minimize the risk that the ex parte procedure will lead to a wrongful taking." 416 U.S. at 616-17, 94 S.Ct. at 1905. See also, Johnson v. American Credit Co., 581 F.2d 526, 534 (5th Cir. Unit A 1978)(writ must be issued by a judge with discretion to deny the writ).[14/]

[4,5] It is clear, however, that Jones was not affected by the portion of the law which authorizes nonjudicial officers to issue writs of attachment. P & M presented its application to a circuit court judge, and the judge authorized the issuance of the writs of attachment against Jones' equipment.

Hence, Jones lacks standing to challenge the offensive portion of the law, and we do not hold the law invalid.[15/] When a plaintiff seeks a declaratory judgment that a state statute is unconstitutional, the requirements for standing must be strictly enforced. See Griswold v. Connecticut, 381 U.S. 479, 481, 85 S.Ct. 1678, 1679, 14 L.Ed.2d (1965). We may not declare a law unconstitutional based upon hypothetical situations which have not, in fact, occurred. See County Court of Ulster County v. Allen, 442 U.S. 140, 155-56, 99 S.Ct. 2213, 2223-24, 60 L.Ed.2d 777 (1979). Because Jones lacks standing to challenge the portion of the Alabama law which authorizes court clerks to issue writs of attachment, he is not entitled to a declaration of the law's unconstitutionality. We therefore affirm

the district court's denial of Jones' motion for partial summary judgment.

III. CONCLUSION

For the foregoing reasons, the decision of the district court is

AFFIRMED.

TJOFLAT, Circuit Judge, specially concurring:

I.

I concur in the result reached by the majority, but I would reach that result by way of a different route. The majority holds that the defendants in this case are immune from damages, and therefore does not reach the merits of the plaintiff's claim. I would find it unnecessary even to reach the immunity question. In my opinion, the defendants cannot be deemed, under the undisputed facts of this case, to have caused the

injury alleged by the plaintiff. Because the crucial element of causation is absent, no liability under 42 U.S.C. § 1983 (1982) can run against the defendants.

I begin with a brief review of the facts. Samuel Jones owed Preuit & Mauldin (P & M a debt arising from P & M's repair work on three of Jones' cotton pickers. The debt went unpaid, and P & M's manager retained an attorney, David L. Martin, to collect on the debt. Alabama law gives equipment repairers like P & M a mechanic's lien against equipment upon which they make repairs. The attorney accordingly brought three actions to foreclose P & M's liens on Jones' three cotton pickers. At the same time, the attorney prepared applications under Ala. Code § 35-11-111 (1975) for three writs of attachment, one for each of the cotton

pickers, and presented the applications to a state circuit court judge. The judge directed the issuance of the writs, and the sheriff seized the cotton pickers. Subsequently, the same judge entered a default judgment against Jones in the foreclosure actions.

It is the procedure the circuit court judge followed in issuing the writs of attachment that Jones alleges deprived him of his fourteenth amendment right to due process. His suit for damages under section 1983, however, was brought not against the judge who issued the writs of attachment. Nor was it brought against the attorney who filed the applications for the writs. Rather, it was brought against P & M, two of its principals, and one of its employees,[1/] whose involvement in the matter was limited to retaining an

attorney for the purpose of finding a way to collect on the debt owed by Jones.

I will for the sake of argument make two assumptions. First, I will assume that the procedure used to effect the attachments was infirm on due process grounds. Second, I will assume that the circuit court judge who issued the writs performed a purely ministerial act. I make the second assumption only because it is not clear from the record exactly what the judge did, aside from ordering the clerk to issue the writs. If he exercised independent judicial discretion in entering the order, a serious question would arise as to whether his involvement in the matter broke the causal link between the attorney's application for the writs and the ultimate seizure of the cotton pickers.[2/] But I will assume that

what the circuit court judge did was purely ministerial, and that the chain of causation between the attorney's application for the writs and the seizure of the cotton pickers therefore remained unbroken. Even with these two assumptions, I would hold that, under the undisputed facts of this case, no section 1983 liability can run against the defendants.

The language of section 1983 "plainly requires proof of an affirmative causal connection" between the actions taken by the defendant and the constitutional deprivation.[3/] Williams v. Bennett, 689 F.2d 1370, 1380 (11th Cir. 1982), cert. denied, 464 U.S. 932, 104 S.Ct. 335, 78 L.Ed.2d 305 (1983); see also Monell v. Department of Social Servs., 436 U.S. 658, 694, 98 S.Ct. 2018, 1037, 56 L.Ed.2d 611 (1978). In Monroe

v. Pape, 365 U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.Ed.2d 492 (1961), the Supreme Court stated that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Accordingly, we must apply common law principles of causation to determine whether the defendants in this case can be held liable under section 1983.

The common law analogy to the constitutional tort involved in this case is the tort of malicious prosecution, which is used as a remedy for wrongful attachment. See W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser & Keeton on the Law of Torts § 120, at 890 & n. 14 (5th ed. 1984). Common law courts have almost universally held that the defendant in such an action may raise, as a complete

defense, his reliance on an attorney's advice in instituting the allegedly malicious prosecution. Id. at 878, 894. That rule is essentially a statement about causation: if a layperson elicits the aid of an attorney in achieving a general legal end, and the attorney directs the client along a particular legal avenue which ultimately results in injury to a third party, the client himself will not be held to have caused the third party's injury. Rather, the common law recognizes that the client quite justifiably relied on the attorney's advice.

In this case, the district court expressly stated that "undisputed evidence" showed that the defendants "relief upon their attorney, who prepared all of the papers and determined the steps to be

followed" [with respect to the attachments]. Jones v. Preuit & Mauldin, 634 F.Supp. 1520, 1528 (N.D.Ala. 1986). Indeed, Edward Mauldin and Leonard Preuit Mauldin[4] "were completely unaware that the attachments were being sought." Id. In light of these facts and in light of the common law principles of causation that we must apply, I fail to see how the defendants can possibly be deemed to have caused the injury allegedly suffered by Jones. The defendants are in the same position as the defendant in a common law action for malicious prosecution who relied on the advice of an attorney.[5] If anyone caused Jones to suffer injury, it was either P & M's attorney or the circuit court judge who issued the writs.[6] Thus, I would hold that Jones' section 1983 claim against the defendants

necessarily fails because, under the undisputed facts of this case, Jones cannot establish the crucial element of causation.[7]

II.

As I stated above were I writing for the majority I would find it unnecessary to reach the immunity issue. In my opinion, that issue becomes relevant only if we assume that both the judge[8] and P & M's attorney played purely ministerial roles in the application for and the issuance of the writs of attachment. As I have noted, the undisputed evidence in this case shows that the attorney did not play a ministerial role.[9] Yet one would have to assume that he did before one could sensibly ask whether the defendants are entitled to assert a good faith defense. For unless we assume that they,

and not their attorney, "called the shots" in applying for the writs of attachment it makes no sense to ask whether "their conduct...violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known."[10/]

If in fact P & M's attorney had played only a ministerial role, with the result that the defendants could legally be held to have caused the plaintiff's alleged injury, I would be willing to hold along with the majority that the defendants can assert a qualified immunity defense. Before extending official immunity law in this manner, however, I think that we should clarify the nature of our undertaking.

It seems to me that immunity law must derive from one of three possible

sources: the Constitution, section 1983 itself, or the inherent power of federal courts to fashion remedies for constitutional wrongs. The first possibility can be ruled out at the outset: the Supreme Court has specifically stated that immunity law is not rooted in the Constutution. See Butz v. Economou, 438 U.S. 478, 497, 98 S. Ct. 2894, 2906, 57 L. Ed. 2d 895 (1978).[11/] The second possibility seems attractive; by employing a fiction, one might say that immunity law is statutorily rooted in that Congress, when it passed the Civil RIghts Act of 1871, intended to incorporate all immunities then recognized at common law. Indeed, this statutory interpretation of immunity law is apparently the interpretation embraced by the Supreme Court in various pronouncements on the subject.

See, e.g., Owen v. City of Independence, 445 U.S. 622, 638, 100 S.Ct. 1398, 1409, 63 L.Ed.2d 673 (1980). My review of all the case law, however, compels me to conclude that the third source -- the federal courts' inherent power to fashion just remedies for constitutioanl wrongs -- is the source that ultimatley shapes the contours of immunity law.

For analytical purposes, it is use to begin by examing the development of immunity law in Bivens-type cases, where the suit for money damages is a direct claim under the Constitution. In Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L.Ed.2d 619 (1971), the plaintiff alleged that federal agents had violated his fourth amendment rights, and that he was entitled to monetary damages for the

injur he suffered. Of course, Bivens could not travel under section 1983, because the federal agents had not acted "under color of" state law; instead, he brought his claim for monetary relief directly under the fourth amendment.

The Supreme Court held that 28 U.S.C. § 1331 (1982), the statute that grants federal questions jurisdiction, provided the district court not only with the authority to entertain Bivens' suit, see Bell v. Hood, 327 U.S. 678, 66 S. Ct. 773, 90 L.Ed. 999 (1946), but also the authority to fashion an appropriate remedy to vindicate the constitutional wronged alleged. In the words of the Court, "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any avai-

lable remedy to make good the wrong done." Bivens, 403 U.S. at 396, 91 S.Ct. at 2004 (emphasis added). The Court then decided that money damages were an appropriate remedy for the injury suffered by Bivens, given that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." Id. at 395, S.Ct. at 2004.

In essence, federal courts in Bivens cases "make the kind of remedial determination that is appropriate for a common-law tribunal." Bush v. Lucas, 462 U.S. 367, 378, 103 S.Ct. 2404, 2411, 76 L.Ed.2d 648 (1983). Congress may provide for an alternative remedy, thus indicating its intent that the courts' inherent remedial power should not be exercised. Id. Absent an indication of that

sort, however, and absent "special factors couselling hesitation," see, e.g., Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), a federal court in a Bivens case will exercise its inherent power to fashion remedies for constitutional wrongs.[12/] In meeting that task, "the range of policy consideration [the courts] may take into account is at least as broad as the range of those a legislature would consider with respect to an express[ed] statutory authorization of a traditional remedy." Bivens, 403 U.S. at 407, 91 S.Ct. at 2010 (Harland, J., concurring).

The recognition of official immunities in Bivens cases should be vied as nothing more than one aspect of this species of remedial determination by federal courts. In deciding how the

remedy in a Bivens case should be influenced by the application of official immunity doctrines, the Supreme Court has attempted to accomodate competing values, balancing the values serves by vindicating constitutional rights through the aware od money damages against the societal costs that result from holding the particular defendant liable for such damages. See, e.g., Harlow v. Fitzgerald, 457 U.S. 800, 814-15, 102 S.Ct. 2727, 2736, 73 L.Ed.2d 396 (1982). The Supreme Court has specifically acknowledged that "the law of privilege as a defense to damages actions against officers of Government has 'in large part been of judicial making.'" Butz v. Economou, 438 U.S. 478, 501-02, 98 S.Ct. 2894, 2908, 57 L.Ed.2d 895 (1978).

It is against this background that immunity law in the section 1983 context should be anlayzed.[13/] As in the Bivens context, Congress has said nothing in the section 1983 context about immunities. Presumably, federal courts are to fill the vacuum themselves, just as they do with respect to immunity law in Bivens cases. Thus, when the Supreme Court says that Congress did not intend to abrogate all common law immunities when it enacted section 1983, see, e.g, Procunier v. Navarette, 434 U.S. 555, 561, 98 S.Ct. 855, 859, 55 L. Ed.2d 24 (1978), I interpret the Court to be saying that federal courts remain free, as they are in the Bivens context, to apply their inherent remedial powers to fashion a body of immunity law that justly accomodates competing interests.[14/]

I perceive no other way to explain satisfactorily the case law concerning section 1983 immunities. As noted above, one might say that immunity law is strictly statutorily based; the statutory argument would be that when Congress passed the Civil Rights Act of 1871, it intended to incorporate those immunities then recognize at common law. Under that analysis, however, fairness concerns would never enter the picture - our task would be limited to a mechanical determination of the state of immunity law in 1871. Surely the Supreme Court's pronouncements, viewed in their entirety, have not suggested such a restrictive approach.[15/] In my opinion, the Court looks at historical antecedents not because there is something magical about immunity law circa 1871, but because what

we call a "legal tradition" often develops precisely because the rule of law at the root of the tradition furthers societal values that we continue to find compelling today.[16/] The Supreme Court's pronouncements on immunities law in the section 1983 context, I submit, show an interest not in slavishly following common law immunity doctrines,[17/] but in preserving the balance of interests that those doctrines struck.

The point I wish to make is simply that the development of immunity law in the section 1983 context should ultimately be viewed as the result of the same kind of remedial decisionmaking that federal courts perform in Bivens cases. Federal courts have inherent power to fashion remedies for constitutional violations.[18/] and they have an obligation

to make those remedies fair - fair not only from the perspective of the aggrieved party, but also from the perspective of the defendant and society as a whole. As the Supreme Court has observed,

> official immunity apparently rested, in its genesis, on two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

Scheuer v. Rhodes, 416 U.S., 232, 240, 94 S.Ct. 1683, 1688, 40 L.Ed.2d 90 (1974) (footnote omitted).

In developing immunities, then, we necessarily engage in what is principally a policy determination. In my view, the polcy determination the majority reaches in this case is a well considered one, and I would therefore concur in it.

VANCE, Circuit Judge, dissenting:

Nothing divides this court like a section 1983 case. Although I join Judge Johnson's dissent, I write separately to lament the sorry state of the law under section 1983 that the fragmented decisions of this and the Supreme Court reflect.[1]

I.

I respectfully disagree with the plurality's opinion that the private de-

fendants in this case are entitled to qualified immunity. I believe that the plurality is wrong in even considering the issue of qualified immunity for private defendants under section 1983. I am particularly concerned because much of the case law under section 1983 is confused or misguided, and no longer corresponds to the reasons Congress enacted section 1983 in the first place.

The present law under section 1983 requires that federal courts inquire into the existence of mutual policies and customs, determine whether there has been a violation of the federal constitution by evaluating the adequacy of state remedies, and decide whether or not the ancient doctrine of the infallibility of kinds extends to middle-level public officials and private parties in a

twentieth century democracy. These seem to me to be the wrong questions to ask about a civil rights statute enacted to enforce the provisions of the fourteenth amendment. See Monell v. Department of Social Servs., 436 U.S. 658, 665, 98 S.Ct. 2018, 2023, 56 L.Ed.2d 611 (1978); Monroe v. Pape, 365 U.S. 167, 171, 81 S.Ct. 473, 475, 5 L.Ed. 492 (1961). Instead, I believe we should ask what kinds of constitutional wrongs section 1983 should provide a federal remedy.

II.

I understand the need to corral the explosion of cases brought into federal court under section 1983. Certainly not every prisoner case involving a negligently lost hobby kit ot a neglected pillow belongs in federal court. Responding to the vast increase in these types of

section 1983 cases, the Supreme Court, in a series of result-oriented decisions, has developed several approaches and doctrines designed to restrict the scope of section 1983. Although these cases have barred certain kinds of actions previously brought under section 1983, I believe that they have failed to limit the scope of section 1983 to the appropriate situations.

A.

The attempts to restrict section 1983 have centered generally on how to distinguish between causes of action "commonly thought to state a claim for a common-law tort normally dealt with by state courts," Parratt v. taylor, 451 U.S. 527, 533, 101 S.Ct. 1908, 1911, 68 L.Ed.2d 420 (1981), and those that rise "to the level of constitutional tort."

Jackson v. City of Joliet, 465 U.S. 1049, 1051, 104 S.Ct. 1325, 1325, 79 L.Ed.2d 720 (1984) (White, J., dissenting from denial of certiorari). Courts and scholars have labored to distinguish constitutional tort actions, worthy of federal forum, from ordinary tort actions couched in constitutional terms, which do not belong in federal courts. Bandes, Monell, Parratt, Daniels, and Davidson: Distinguishing a Custom or Policy from a random, Unauthorized Act, 72 Iowa L.Rev. 101, 102 (1986).

One attempt to make this distinction borrows from tort law the consepts of mere negligence and intent, and tries to distinguish constitutional torts from ordinary torts on the basis of the culpability of the actors. Early decisions of the former Fifth Circuit wrestled with

this approach. See, e.g, York v. City of Cedartown, 648 F.2d 231, 232-33 (5th Cir. Unit B 1981) (facts do not support claims of negligence and nuisance and therefore do not rise to an "abuse of governmental power" required to raise an ordinary tort claim to the level of a constitutional violation); Jones v. Diamond, 636 F.2d 1364, 1380-81 (5th Cir. 1981)(in banc) (had individual claims been presented under section 1983, it would have been neccessary to examine the nature of the right asserted, apply standards for liability under section 1983, and afford defendants an opportunity to plead official immunity), cert. dismissed, 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981); Williams v. Kelley, 624 F.2d 695, 697-98 (5th Cir. 1980)(question of whether defendants'

conduct was "sufficiently egregious as to be 'constitutionally' tortious" is resolved by looking to principles of official immunity, and negligence is not enough), cert. denied, 451 U.S. 1019, 101 S. Ct. 3009, 69 L.Ed.2d 391 (1981); Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. Unit A Jan. 1981)(determining when physical tort amounts to a section 1983 action involves inquiry into the amount of force used compared to the need presented, the extent of injury inflicted and the motives of the state officer).

The issue of what standard of care applies to section 1983 actions has remained a major theme. The Supreme Court repeatedly has addressed the issue of whether mere negligence will support a claim for relief under section 1983, or whether some higher standard is required.

See Parratt, 451 U.S. at 532-33, 101 S.Ct. at 1911-12; see also Rizzo v. Goode, 423 U.S. 352, 385 & n.2, 96 S. Ct. 598, 611 & n. 2, 46 L.Ed.2d 561 (1976) (Blackmun, J., dissenting)(raising but not resolving the issue of whether negligent failure to supervise will support a section 1983 action for damages). The Supreme Court has resolved the issue only partially, by holding ion the Parratt line of cases that negligent acts of officials that cause intentional losses do not amount to procedural due process violations, and hence are not actionable under section 1983. See Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 663, 88 L.Ed.2d 662 (1986); Davidson v. Cannon, 474 U.S. 344, 106 S.Ct. 668, 670, 88 L.Ed.2d 677 (1986). Other standard of care issues under section 1983 have never

been resolved by the Supreme Court, See Daniels, 106 S.Ct. at 667 n.3; see also Gilmere v. City of Atlanta, 774 F.2d 1495, 1503-04, &nn. 8, 9 (11th Cir. 1985)(there exists substantial disagreement as to whether gross negligence can suffice under section 1983 to establish municipal liability).

In any event, this approach has never been satisfactory. Although the Supreme Court has written that "the difference between one end of the spectrum - negligence - and the other - intent - is abundantly clear," Daniels, 106 S. Ct. at 667, the middle of the spectrum is not so clear. Id; cf. Davidson, 106 S.Ct. at 675 (Blackmun, J., dissenting)(finding that recklessness is sufficient and doubting the district court's conclusion that the prison officials were not reck-

less). Even if the lines were clear, I do not believe that culpability quantification serves to differentiate constitutional torts from ordinary torts in a meaningful way. Determining whether, for example, a standard automobile collision case belongs in state or federal court on the basis of whether the driver was negligent or reckless does not strike me as a good way to think about the problem. I believe therefore that this approach is unfit for analyzing section 1983 action.

B.

The Supreme Court also has attempted to curb the abuse of section 1983 by exploring the contours of municipal liability under the statute. In Monell, the very case that exposed municipalities to section 1983 liability by reversing the contrary holding of Monroe v. Pape, 365

U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.Ed.2d 492 (1961), the Supreme Court introduced the "policy or custom" test for determining under what circumstances a municipality can be sued under section 1983. Ten years later, the Supreme Court is still struggling with this approach, and the lower federal courts have been left with the nearly impossible task of determining what kinds of government actions amount to a policy or custom.

The Supreme Court held in Monell that "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." 436 U.S. at 684, 98 S.Ct. at 2037. The obvious problem with

this test is the word "fairly," and the inherent vagueness of the terms "policy" and "custom." Justice Powell recognized in Monell that there were "substantial line-drawing problems in determining 'when execution of government's policy or custom' can be said to inflict constitutional injury such that 'government as an entity is responsible under § 1983.'" 436 U.S. at 713, 98 S.Ct. at 2047 (Powell J., concurring).[2/]

Despite many efforts by the Supreme Court, I believe that these intractable line-drawing problems have never been surmounted, and indeed may be unsolvable. I find the concept of requiring an official policy to be "the moving force" behind a constitutional violation to be particularly difficult. See City of Oklahoma City v. Tuttle, 471 U.S. 808,

105 S.Ct. 2427, 2434, 85 L.Ed.2d 791 (1985); Polk County v. Dodson, 454 U.S. 312, 326, 102 S.Ct. 445, 454, 70 L.Ed.2d 509 (1981); Monell 436 U.S. at 694, 98 S.Ct. at 2037. The Monell doctrine also has proven to be particularly unsuitable to cases involving "isolated acts by government officials and employees." City of St. Louis v. Praprotnik, - U.S. _____, 108 S.Ct. 915, 923, 99 L.Ed.2d 107 (1988)(plurality opinion); see Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986); Tuttle, 105 S.Ct. 2427 (1985). In this context the Monell policy or custom approach has generated such inquiries as "whether a policymaker's 'gross negligence' in establishing police training practices [can] establish a "policy' that constitutes a 'moving force'

behind subsequent unconstitutional conduct or whether a more conscious decision on the part of the policymaker [is] required." Tuttle, 105 S.Ct. at 2436 n. 7

These kinds of inquiries have carried the law of section 1983 far from the purpose of that statute. As Justice Stevens has noted, "the issue has apparently become, not the purpose and scope of 42 U.S.C. § 1983, but the nature of the liability 'envisioned' by this court 'in Monell." Pembaur, 106 S.Ct. at 1302 n.1 (Stevens, J., concurring in part and concurring in the judgment)(quoting id. at 1304 (O'Connor, J., concurring in part and concurring in the judgment)). The word "policy" does not appear in the text of section 1983, 106 S.Ct. at 1302 (Stevens, J., concurring in part and concurring in the judgment), and I do not

believe Congress had a municipal policy requirement in mind when it enacted section 1983.

The policy or custom approach thus has been unsuccessful in serving as a proper limit on the scope of section 1983. I cannot agree with the statement in Justice Brennan's opinion in Tuttle that "[s]ince Monell, of course, the contours of municipal liability have become substantially clearer." Tuttle, 105 S.Ct. at 2437 n. 1 (Brennan, J., concurring in part and concurring in the judgment). Nor can I agree with the statement by the Tuttle majority tha although the Supreme Court "has decided a host of cases under [section 1983] in recent years, it can never hurt to embark" on more statutory interpretation. Id. at 2432. I believe that the Supreme

Court's statutory interpretation of section 1983 has hurt, by generating a great deal of confusing litigation and doctrinal turmoil. Rather than refining these principles, as the Supreme Court has indicated it may do in the future, see Praprotnik, 108 S. Ct. at 926 (plurality opinion), I hope that the Court will choose to abandon the Monell policy or custom approach.

Faced with the possibility of section 1983 extending all the way out to an accidental twenty-three dollar property loss case, the Supreme Court in 1981 put its "shoulder to the wheel" once again to help delineate between constitutional torts and ordinary torts. Parratt v. Taylor, 451 U.S. 527, 533-34, 101 S.Ct. 1908, 1912, 68 L.Ed.2d 420 (1981). Although the Court held that negligence

will support a cause of action under section 1983, id. at 536-37, 101 S.Ct. at 1913-14,[3/] the Court also held that there is no procedural due process violation under the fourteenth amendment if the state provides a constitutionally adequate remedy for the negligent property deprivation. Id. at 537-44, 101 S.Ct. at 1913-17.

The decision was clearly a reaction to the concerns noted by Justice Powell in his dissent: "The present case, involving a $23 loss, illustrates the extent to which constitutional law has been trivialized, and federal courts often have been converted into small-claims tribunals." Id. at 554 n. 13, 101 S.Ct. at 1922 n. 13 (Powell, J., concurring in the result). I am entirely sympathetic to these concerns. The ef-

fort, however, in Parratt and subsequent cases to address these concerns by considering the adequacy of state law remedies is wholly unwarranted and unrelated to the reasons Congress enacted section 1983.

Congress assumed the availability of state remedies when it enacted the Civil Rights Act of 1871.

> [T]he legislative history of § 1983's predecessor makes clear that Congress intended to alter the federal-state relationship with respect to the protection of federal rights. "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights." Mitchell v. Foster, 407 U.S. 225, 242, 92 S.Ct. 2151, 2162, 32 L.Ed.2d 705 (1972). In particular, Congress intended "to provide a federal remedy where the state remedy. . . was not available in practice." Monroe v. Pape, 365 U.S., at 174, 81 S.Ct. at 477.

Davidson, 106 S.Ct. at 676 (Blackmun, J., dissenting) (emphasis added). There were state law remedies on the books when Congress enacted section 1983. Congress was not attempting to fill gaps in these state remedies. Rather, Congress intended to provide a federal remedy for constitutional deprivations, regardless of what state law provided.

The existence of a state remedy is irrelevant in determining what kind of wrongs section 1983 should redress. As Justice Blackmun recognized in his opinion in Parratt: "The mere availiability of a subsequent tort remedy before tribunal of the same authority that, [through] its employees, deliberately inflictred the harm conplained of, might well not provide the due process of which the Fourteenth Amendment speaks." 451

U.S. at 546, 101 S.Ct. at 1918 (Blackmun, J., concurring); see also Logan v. Zimmerman Brush Co., 455 U.S. 422, 436-37, 102 S.Ct. 1148, 1158-59, 71 L.Ed.2d 265 (1982) (post-deprivation remedy is constitutionally inadequate where only process comes in the form of an independent tort action).[4/]

I recognize that the Parratt doctrine applies primarily to procedural due process claims, and not to substantive due process claims brought under section 1983.[5/] See Burch v. Apalachee Community Mental Health Services, 840 F.2d 797, 803 (11th Cir. 1988) (Johnson, Circuit Judge, specially concurring); Gilmere, 774 F.2d at 1499-1500. Nevertheless, I believe that the introduction of the adequacy of state remedies into section 1983 analysis, even primarily limited to procedural

due process violations, conflicts with the purposes of section 1983. "Conduct that is wrongful under § 1983 surely cannot be immunized by state law." Davidson, 106 S.Ct. at 676 (Blackmun, J., dissenting). I believe that the Supreme Court should reevaluate the applicability of the Parratt doctrine to section 1983.

D.

A fourth major assault on the expansion of section 1983 involves the issue of immunity for governmental officials. Although the Supreme Court has held that municipalities have no immunity from damages liability flowing from constitutional violations under section 1983, Owen v. City of Independence, 445 U.S. 622, 657, 100 S.Ct. 1398, 1418, 63 L.Ed.d 673 (1980), the Court has held that many government officials do have

some kind of immunity. See, e.g., Anderson v. Creighton, __ U.S. __, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (federal law enforcement officers conducting unconstitutional searches have good faith immunity); Pulliam v. Allen, 466 U.S. 522, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984) (judges have absolute immunity from suits for injuctive relief); Briscoe v. Lahue, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983) (police officers giving perjured testimony have absolute immunity); Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (presidential aides have good faith immunity); Ibler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) (prosecutors acting in official capacity have absolute immunity); Wood v. Strickland, 420 U.S. 308, 95

S.Ct. 992, 43 L.Ed.2d 214 (1975) (school officials have good faith immunity); Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (governors have good faith immunity).

The historical principle of sovereign immunity, the "somewhat arid fountainhead for municipal immunity," Owen, 445 U.S. at 645, 100 S.Ct. at 1412, "stems from the personal immunity of the English Monarch as expressed in the maxim, 'The king can do no wrong.'" Id. at 645 n. 28, 100 S.Ct. at 1412 n. 28; see Duncan v. Peck, 844 F.2d 1261, 1264 (6th Cir. 1988); see also Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 357 (2d Cir. 1964) (doctrine of sovereignty, when kings could theoretically do no wrong"), cert.

denied, 381 U.S. 934, 85 S.Ct. 1763, 14 L.Ed.2d 698 (1955). This rationale for governmental immunity obviously has no relevance today. The Supreme Court, however, has analyzed contemporary immunity issues on the assumption that common law principles of immunity have been incorporated into our judicial system absent clearly legislative intent to the contrary. Pulliam, 466 U.S. at 529, 104 S.Ct. at 1974. Thus whether absolute or good faith immunity under section 1983 extends to a particular governmental unit or official depends on the state of the common law in 1871 when Congress enacted the statute. See id. at 529-536, 104 S.Ct. at 1974-1978; Owen, 445 U.S. at 635-47, 100 S.Ct. at 1407-13.

It is debatable whether trying to divine the common law as it existed in

the various states over a century ago is a good approach. See, e.g., Anderson, 107 S.Ct. at 3041 ("we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law"); Smith v. Wade, 461 U.S. 30, 93, 103 S.Ct. 1625, 1659, 75 L.Ed.2d 632 (1983) (O'Connor, J., dissenting) ("the battle of string citations can have no winner"). In any event, lacking Congressional guidance, it is clear that courts have created governmental immunities where there exist sound policy reasons to do so. See Harlow, 457 U.S. at 813 N. 20, 102 S.Ct. at 2735 n. 20; Nixon v. Fitzgerald, 457 U.S. 731, 748, 102 S.Ct. 2690, 2700, 73 L.Ed.2d 349 (1982); Owen, 445 U.S. at 637, 100 S.Ct. at 1408.

I can see no sound policy reason to give good faith immunity to private defendants in section 1983 actions. As Judge Johnson convincingly shows in Part I of his dissenting opinion in this case, the plurality's alleged "powerful policy considerations" supporting such immunity for private individuals are irrelevant to section 1983, the statute at issue in this case. The genesis of this misguided notion of providing good faith immunity to private parties is in the last footnote of the majority opinion in Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). Responding to Justice Powell's concern over private individuals who innocently make use of apparently valid state laws later held unconstitutional, Justice White wrote for the majority:

> In our view ... this problem should be dealt with not by changing the character of the cause of action, but by establishing an affirmative defense. A similar concern is at least partially responsible for the availability of a good-faith defense, or qualified immunity, to state officials. We need not reach the question of the availability of such defense to private individuals at this juncture.

Id. at 942 n. 23, 102 S.Ct. at 2756 n. 23. Whatever this passage reveals about how the Supreme Court will rule on the issue,[6/] I believe that there is no valid basis in nineteenth century common law or contemporary public policy for the plurality's holding. Accord, Duncan v. Peck, 844 F.2d at 1266.

The decision to give private individuals good faith immunity under section 1983 is yet another manifestation of the underlying frustration federal courts have felt about section 1983 in the last

decade or so. Once again, I stress that I share this frustration, but the plurality's approach is simply a legally incorrect way to go about remedying the situation. Contrary to the assertions of the plurality, today's opinion comports with neither the text, the purpose, nor the general development of the law under section 1983. See ante at 1344 n. 6. (Johnson, Circuit Judge, dissenting). Extension of good faith immunity to private defendants is nothing more than a striking display of judicial activism.[7/] As Judge Johnson demonstrates, "[t]here is no justification for this extension of the qualified immunity doctrine." Ante at 1343 (Johnson, Circuit Judge, dissenting). The plurality asks a bad question, and gets a bad result.

III.

There are too many section 1983 cases in federal court that do not belong in federal court. There is now a large enough body of case law so that we understand the nature of the problem. I have not attempted to present solutions to all of the inadequacies in the law under section 1983. I simply lament these inadequacies in the hope that the Supreme Court will undertake a wholesale reevaluation of current law. I believe that the Supreme Court will undertake a wholesale reevaluation of current law. I believe that the Supreme Court should address these problems by developing a new framework for deciding what kinds of harms amount to constitutional torts under the statute.[8/]

I believe that the issues and the result reached by the court in this case,

are all wrong. I therefore respectfully dissent.

JOHNSON, Circuit Judge, dissenting, in which VANCE, KRAVITCH, HATCHETT and CLARK, Circuit Judges, join.

The majority holds that Preuit & Mauldin ("P & M") and the other private defendants in this case[1/] are entitled to assert, a defense of qualified immunity to Jones' damages action brought pursuant to 42 U.S.C.A. § 1983. I find no justification for allowing private defendants to assert such a defense. Moreover, even assuming arguendo that a qualified immunity defense is available to some private defendants, I disagree that P & M successfully established such a defense. Accordingly, I dissent.

I.

Both the Supreme Court and this Circuit have expressly reserved the

question of whether private actors in a Section 1983 action are entitled to the qualified immmunity available to state actors. Lugar v. Edmondson Oil Co., 457 U.S. 922, 942 N. 23, 102 S.Ct. 2744, 2756 n. 23, 73 L.Ed.2d 482 (1982); I.A. Durbin, Inc. v. Jefferson National Bank, 793 F.2d 1541, 1550 n. 11 (11th Cir.1986). The circuits that have addressed this issue have reached opposite conclusions. The First and Ninth Circuits have held that private actors are not entitled to qualified or "good faith" imunity, Howerton v. Gabica, 708 F.2d 380, 385 n. 10 (9th Cir.1983); Downs v. Sawtelle, 574 F.2d 1, 15-16 (1st Cir.), cert. denied, 439 U.S. 910, 99 S.Ct. 278, 58 L.Ed.2d 255 (1978), while the Fifth and Eighth Circuits have held that such immunity for private defendants

exists. Buller v. Buechler, 706 F.2d 844, 850-53 (8th Cir.1983); Folsom Investment Co. v. Moore, 681 F.2d 1032, 1037-38 (5th Cir. Unit A 1982). I believe that an examination of the immunity doctrine demonstrates that the First and Ninth Circuits are correct in holding that private defendants are not entitled to qualified immunity.

Section 1983 provides that every person who acts under color of state law to deprive another person of a constitutional right shall be liable to that person for damages.[2/] On its face, Section 1983 "admits of no immunities." Imbler v. Pachtman, 424 U.S. 409, 417, 96 S.Ct. 984, 988, 47 L.Ed.2d 138 (1976). Nonetheless, the Supreme Court has reasoned that in enacting Section 1983, Congress did not intend to supplant traditional

immunities embedded in the common law. Therefore, if an immunity was firmly established in the common law when Congress enacted Section 1983 and if strong policy reasons support its continued use, the immunity is available under Section 1983. Owen v. City of Independence, 445 U.S. 622, 637-38, 100 S.Ct. 1398, 1408-09, 63 L.Ed.2d 673 (1980); Pierson v. Ray, 386 U.S. 547, 554-55, 87 S.Ct. 1213, 1217-18, 18 L.Ed.2d 288 (I967). However, courts cannot engraft new immunities onto the statute. Tower v. Glover, 467 U.S. 914, 922-23, 104 S.Ct. 2820, 2825-26, 81 L.Ed.2d 758 (1984). Nor can courts recognize traditional immunities that eviscerate the policies of Section 1983. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258-59, 101 S.Ct. 2748, 2755-56, 69 L.Ed.2d 616 (1981). Rather,

Section 1983 immunity is "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." Owen, 445 U.S. at 638, 100 S.Ct. at 1409 (quoting Imbler, 424 U.S. at 421, 96 S.Ct. at 990).

The majority identifies no immunity that P & M would have enjoyed at common law. Instead, it argues that, at the time of Section 1983's enactment, the common law recognized a defense of "good faith and probable cause" to tort actions brought for wrongful attachment or malicious prosecution. Citing Wood v. Strickland, 420 U.S. 308, 318-19, 95 S.Ct. 992, 999, 43 L.Ed.2d 214 (1975), and Pierson, 386 U.S. at 555-57, 87 S.Ct. at 1218-19, the majority asserts that the Supreme Court has held that the existence

of a common law defense of good faith and probable cause supports the availability of qualified immunity under Section 1983. Maj. op. at 1324. However, Wood extended qualified immunity to school board members because of common law tradition and "strong public policy reasons." 420 U.S. at 318, 95 S.Ct. at 999. The policy rationale for extending qualified immunity to these state officials was that, in the school disciplinary process, school board members functioned "in the nature of legislators and adjudicators."[3/] Id. at 319, 95 S.Ct. at 999. Because "[e]ach of these functions necessarily involves the exercise of discretion, the weighing of many factors and the formulation of long-term policy," id., the Wood Court concluded that school board members were entitled to qualified

immunity. See id. at 319-21, 95 S.Ct. at 999-1000. In addition, the Court noted that, if school board members did not have qualified immunity, they would be deterred from acting forcefully and decisively in the long-term interest of the schools. Id. at 319-20, 95 S.Ct. at 999-1000.

None of these factors is present in the case at bar. Unlike public officials, private defendants do not exercise official discretion, nor do they formulate policy. Public officials receive qualified immunity so that they will not be deterred from exercising the discretion accorded them, and so that able citizens will not be deterred from accepting public office. Harlow v. Fitzgerald, 457 U.S. 800, 814, 102 S.Ct. 2727, 2736, 73 L.Ed.2d 396 (1982); Wood,

420 U.S. at 319-20, 95 S.Ct. at 999-1000. Qualified immunity serves the additional public purposes of encouraging the virorous exercise of public authority while shielding officials from undue interference with their duties. Harlow, 457 U.S. at 806-07, 102 S.Ct. at 2731-32; Butz v. Economou, 438 U.S. 478, 506, 98 S.Ct. 2894, 2910, 57 L.Ed.2d 895 (1978). In short, qualified immunity is intended to protect the public office as opposed to the public officer. See Harlow, 457 U.S. at 814, 102 S.Ct. at 2736. Cf. Sparks v. Duval County Ranch Co., 604 F.2d 976, 979 (5th Cir.1979) (en banc) ("absolute immunity that judges enjoy exists for the benefit of the judicial system and of the public, not for that of the judge"), aff'd sub nom. Dennis v. Sparks, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980).

Despite the fact that the defendants in this case do not occupy public office and are not accorded any public discretion or policy-making authority, the majority concludes that they are entitled to qualified immunity. There is no justification for this extension of the qualified immunity doctrine. "Private parties simply are not confronted with the pressures of office, the often split-second decisionmaking or the constant threat of liability facing public officers, governors and other public official." Downs, 574 F.2d at 15.

Because none of the policy considerations which support the qualified immunity doctrine is present in this case, the majority creates its own policy rationale for providing private actors with qualified immunity. It argues that citi-

zens should not be exposed to liability based on their use of a state statutory attachment procedure.[4/] While the simplicity of this suggestion may be appealing, the majority errs by proposing its own policy justification for extending qualified immunity to private defendants. See id. at 15-16. ("Whatever factors of policy and fairness militate in favor of extending some immunity to private parties acting in concert with state officials were resolved by Congress in favor of those who claim a deprivation of rights.")

The Supreme court has prohibited the mode of judicial policy-making adopted by the majority. The Court has said, "We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public

policy. It is for Congress to determine whether § 1983 litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate." Tower, 467 U.S. at 922-23, 104 S.Ct. at 2825-26.[5/]

II.

Even assuming arguendo that private parties should be entitled to qualified immunity in Section 1983 actions, P & M has not established its right to the defense here. Qualified immunity is not available if the defendants reasonably should have known that their conduct violated Jones' clearly established constitutional right. See Anderson v. Creighton, _____ U.S. _____, 107 S.Ct. 3034, 3038, 97 L.Ed. 523 (1987); Harlow, 457 U.S. at 818, 102 S.Ct. at 2738. In this case, established precedent indi-

cated that the attachment procedure used by P & M was unconstitutional. Nonetheless, the majority concludes that P & M did not violate clearly established constitutional rights of which a reasonable person should have known. After discussing the four major Supreme Court attachment cases, the majority asserts that P & M is entitled to good faith immunity because the defendants' actions were arguably commensurate with the safeguards required by Mitchell v. W.T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974). While I agree that Mitchell establishes the standard against which attachments should be measured, the attachment procedure utilized by P & M does not comport with the procedure upheld in Mitchell. Therefore, even under a qualified immunity analysis, I would

hold that P & M violated Jones' clearly established constitutional rights because the attachment procedure it employed did not provide Jones with preseizure notice and hearing[7/]

In Mitchell, the Supreme Court held that preseizure notice and hearing were not required if the attachment procedure satisfied four requirements. These requirements include: (1) the creditor must file an affidavit setting forth the specific facts entitling him to relief; (2) the creditor must post a bond to compensate the debtor for any damages resulting from a wrongful attachment; (3) the writ of attachment can be issued only by a judge with discretion to deny the writ; and (4) the debtor must be entitled to an immediate postseizure hearing at which the creditor must prove

his entitlement to the writ. All these safeguards were not present here.

First, the judge who issued the writs of attachment in the instant case was not vested with sufficient discretion to satisfy the dictates of Mitchell. Specifically, he could not inquire into the veracity of P & M's allegations made in its affidavit seeking the writs. As the majority indicates, the attachments here were obtained under Alabama's mechanic's lien statute. Alabama Code § 35-11-110 creates a lien in favor of a repairman against any vehicle he repairs, and Alabama Code § 35-11-111 outlines the procedures for enforcing that lien by attachment. Although Section 35-11-111 requires both the filing of an affidavit setting forth the plaintiff's entitlement to relief and the posting of a bond pay-

able to the defendant in case of a wrongful attachment, that section does not specify who is authorized to issue the writ. Instead, it provides only that the writ is to be issued "by any officer authorized to issue such writs." Id. Therefore, in order to determine who can issue such a writ and what discretion the issuing officer possesses, resort must be had to the provisions of Alabama's general attachment statute. Those provisions authorize a circuit court judge to issue a writ of attachment. Ala. Code § 6-6-43. However, nothing in those provisions authorizes a circuit court judge to go behind a creditor's allegations in order to determine their validity. In actions involving either the seizure of property under the detinue statute or the enforcement of a security interest, Ala.R.Civ.P.

64(b) mandates a judicial inquiry into the facts supporting the need for an attachment without prior notice. However, both Rule 64 and its Committee Comments indicate that the special procedures established therein apply only to actions in detinue or in enforcement of a security interest and that those procedures are in addition to the procedures required under the general attachment statute.[8/] Consequently, in issuing a writ of attachment under Section 35-11-111, the circuit court judge's function is solely to determine the adequacy of the plaintiff's allegations. If the facts as alleged would entitle the plaintiff to relief, the judge must issue the writ. He cannot determine whether the allegations are in fact true.

Such limited "discretion" fails to provide the meaningful judicial participation contemplated in Mitchell. The safeguards outlined in Mitchell are a substitute for prior notice and hearing because, like preseizure notice, they protect debtors against "abuse by creditors without valid claims." 416 U.S. at 614, 94 S.Ct. at 1903. Therefore, judicial participation in issuing a writ of attachment does not provide a substitute for preseizure notice unless that participation helps "minimize the risk that the ex parte procedure will lead to a wrongful taking." Id. at 617, 94 S.Ct. at 1905. Judicial participation does not meaningfully reduce the risk of a wrongful attachment unless the judge can, if necessary, inquire into the truthfulness of the creditor's allegations. Other-

wise, the judge's involvement would amount to nothing more than the very type of ministerial determination that the Supreme Court has struck down as insufficient to provide due process when performed by a clerk. See North Georgia Finishing, Inc. v. Di-Chem, 419 U.S. 601, 606-07, 95 S.Ct. 719, 722-23, 42 L.Ed.2d 751 (1975). This is not to say, however, that a judge must put every creditor to his proof or that a creditor, prior to issuance of a writ of attachment, must prove his claim by a preponderance of the evidence. Rather, the judge must possess the ability, in the exercise of his discretion, to require more proof from the creditor than the creditor's affidavit in deciding whether to issue a writ of attachment without prior notice to the debtor. For example, under certain cir-

cumstances the judge may wish to examine the documents giving rise to the creditor's interest in the property. If such proof is not forthcoming, the judge should be able to deny issuing the writ until the debtor is provided notice and an opportunity for a hearing.

The majority reads Mitchell as requiring no more from the judge than that he determine the facial sufficiency of the allegations. They base their reading on the ground that the state sequestration statute upheld in Mitchell allowed the judge to issue the writ "only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for issuance of the writ clearly appear from specific facts shown by cerfiied petition or affidavit." 416 U.S. at 616, 94 S.Ct. at 1904. However,

nothing in that statute prohibited the court from requiring additional proof. Furthermore, the Court emphasized in Mitchell that a preseizure hearing was unnecessary because the issues involved in that case - the existence of a vendor's lien and the purchaser's default - were particularly suited for documentary proof. Id. at 617-18, 94 S.Ct. at 1905-06. A claim that is amenable to documentary proof helps reduce the risk of a wrongful attachment only if the court issuing the writ can examine any supporting documents. In the instant case, the state circuit court judge had no discretion to scrutinize any documents that may have existed.

The second major safeguard which appeared in the statutory scheme in Mitchell, but which is not part of the

Alabama statue, is an immediate post-seizure hearing at which the debtor could challenge the attachment and require the creditor to prove the grounds for the seizure. Id. at 618, 94 S.Ct. at 1905. The Alabama statute only allows the debtor to bring a damages action on the creditor's bond. This is not the same as an immediate postseizure hearing because it does not require the creditor to prove his grounds for the attachment, and it does not provide for a method to dissolve the attachment.

In Di-Chem, the Supreme Court recognized that the immediate postseizure hearing which was available in Louisiana was a significant factor distinguishing Mitchell from Di-Chem. See Di-Chem, 419 U.S. at 607, 95 S.Ct. at 722. In the case at bar, the majority contends that

Jones could have brought a common law action to dissolve the attachment; however, Di-Chem emphasized that the lack of statutory safeguard distinguished it from Mitchell. Likewise, the lack of statutory post-attachment hearing at which the creditor is required to prove his grounds for the attachment distinguishes the Alabama statute from the one in Mitchell.

The predecessor to this Court recognized that Mitchell and Di-Chem require the "participation of a judicial officer, specific factual allegations of entitlement, and access to an 'immediate' post-seizure hearing." Johnson v. American Credit Co. of Georgia, 581 F.2d 526, 534, n. 16 (5th Cir. 1978)(citation omitted). The Alabama attachment statute does not sufficiently satisfy these requirements; therefore, P & M's attachment did not

comport with due process. Because the attachment proccedure used by P & M was not commensurate with the Mitchell safeguards, P & M violated Jones' clearly established constitutional rights.

III.

The majority also affirms the district court's denial of Jones' motion for partial summary judgment on the issue of the constitutionality of the Alabama attachment statute. The majority states that Jones did not have standing to challenge the provision of the statute that authorizes a nonjudicial officer to issue a writ of attachment because a state circuit court judge issued the writ in this case. While I do not dispute the correctness of this statement of law, it amounts to a straw man. The majority fails to address Jones' arguments

concerning the statute's additional shortcomings. As discussed more fully above, the statute fails to provide that the judge who issues the writ has discretion to scrutinize the creditor's allegations, and the statute does not provide for an immediate postseizure hearing at which the debtor can challenge the writ. Because the Alabama attachment statute does not include these two vital provisions, it fails to comport with the requirements of Di-Chem and Mitchell. Consequently, as the district court held in Wiggins v. Roberts, the statute is unconstitutional. I would therefore hold that the district court abused its discretion in failing to grant Jones' motion for partial summary judgment.

IV.

In sum, I believe that the majority exceeds this Court's role by extending

qualified immunity to private defendants based on the majority's view of the appropriate policy considerations. Moreover, policy aside, good faith immunity for P & M is not warranted by the facts of this case. Therefore, I would reverse the district court's order granting summary judgment to the defendants.[9/] Because the Alabama attachment statute is unconstitutional, I would also reverse the portion of the district court's order denying Jones' motion for partial summary judgment.

APPENDIX F FOOTNOTES

1/ The involuntary plaintiffs were Dan Gilchrist, Jr., an individual, the Small Business Administration, a federal agency, and the Citizens Bank, an Alabama bank. The Small Business Administration was never served and did not take part in the state court action.

2/ On the day of the attachment, Jones contracted and conferred with his lawyer, J. G. Speake, whose firm also represented Citizens Bank, which filed the motion for dissolution. This relationship is discussed further at infra n. 5.

3/ In this case Jones challenges only the prejudgment attachment procedures. It is clear that the attachment mechanism became inconsequential on May 19, 1982. As of that date, as between Jones and P & M, the equipment was subject to levy and sale to satisfy the judgment of the circuit court, and P & M no longer needed to rely upon the prejudgment attachment provisions.

4/ Citizens Bank appealed this decision to the Alabama Court of Civil Appeals, which agreed with the bank's position that it had a superior interest in the farming equipment. The court reversed the county court's denial of the Bank's motion to dissolve the writs of attachment. See Citizens Bank v. Preuit Es-

tate, 425 So.2d 470 (Ala. Civ. App. 1982).

5/ In filing this motion, Jones was counseled by J. G. Speake of Speake, Speake and Reich of Moulton, Alabama. A. P. Reich of that same firm represented Citizens Bank. The record suggests that Citizens Bank may have been attempting to effectuate the favorable decision of the Court of Civil Appeals by standing aside while the motion was filed on behalf of Jones. The bank was unable to effectuate the decision more directly because it had failed to file a bond to stay the circuit court judgment and sale of the cotton pickers pending the appeal. The Supreme Court of Alabama ultimately held that the sale of the cotton pickers could not be the basis of a damage action by the bank because of its failure to stay the sale. See Citizens Bank v. Mauldin, 476 So.2d 103 (Ala. 1985).

6/ Jones' state court proceedings concluded with no evidence on the record which would call into doubt his indebtedness to P & M, the existence of P & M's mechanic's liens, or P & M's right to satisfy Jones' debt with the three cotton pickers.

7/ The Supreme Court viewed the question in terms of a choice between providing defendants with a good faith defense and incorporating a requirement of bad faith as an element of the plaintiff's

claim. The court expressed a preference in favor of establishing good faith as a defense. Lugar, 457 U.S. at 942 n. 23, 102 S.Ct. at 2756 n. 23. When good faith is posted as an affirmative defense, of course, the burden of proof is on the defendant rather than on the plaintiff.

8/ Judge Tjoflat's special concurrence provides a thorough analysis of the foundation for the courts' authority to establish and define immunities. Because the Supreme Court in Owen and Pierson has provided an analysis through which qualified immunity may be derived in the present case, we do not undertake the more fundamental analysis in this opinion.

9/ Our conclusion that qualified immunity is available to private defendants in this context is supported by the Supreme Court's discussion of the issue in Lugar. In response to Justice Powell's concern that private individuals might be held liable for innocently relying upon state laws, the court stated: "[i]n our view, however, this problem should be dealt with not by changing the character of the cause of action but by establishing an affirmative defense. A similar concern is at least partially responsible for the availability of the good-faith defense, or qualified immunity, to state officials." Lugar, 457 U.S. at 942 n. 23, 102 S.Ct. at 2756 n. 23. While the court did not decide the question of whether qualified immunity is available to private defendants, the implication is strong.

10/ It is important to note that nothing in the Supreme Court's opinion in Mitchell required that the judge issuing the writ have the authority to determine the veracity of the creditor's allegations. Under the Louisiana statute upheld in Mitchell, the judge issued the writ "if the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appeared from specific facts shown by verified petition or affidavit." Id. at 616. Our reading of Mitchell requires that the issuing judge be convinced that if what the creditor alleges is true, the creditor is entitled to a writ of attachment. The judge must have the authority to make sure that the affidavit alleges the necessary grounds for issuing the writ. Requiring any further investigation at that point would vitiate Mitchell and essentially require a preseizure hearing in every case, which is plainly not required. Further, as in Mitchell where the attachment was based on a vendor's lien, the specific facts necessary to establish grounds for a mechanic's lien are easily established by documentary proof, thus decreasing the likelihood that a seizure will prove to have been a mistake. See Mitchell, 416 U.S. at 612, 94 S.Ct. at 1902.

11/ While appellant disputes that Alabama law provides a reasonably prompt opportunity to challenge the attachment, the facts of this case are to the contrary. On the day of attachment, April 8, 1982, two of the involuntary plain-

tiffs filed a motion to dissolve the attachments and requested a hearing. Jones was certainly entitled to do the same. As stated, he was apparently counselled by the same law firm that filed the dissolution motion on behalf of the Citizens Bank. He could not have been unaware of the opportunity to take such action. While the hearing on the involuntary plaintiffs' motion was not held for approximately two months, the delay may be attributed to the fact that the involuntary plaintiffs had little reason to push for the prompt release of equipment which was safely held by the sheriff. We also note that a portion of the delay was caused by a death in the family of one of the attorneys involved in the case. The statute upheld in Mitchell provided no time frame within which a dissolution hearing was to be held, and the actual post-seizure hearing in that case was held more than five weeks after the writ was issued. See Mitchell, 416 U.S. at 602-603, 622, 94 S.Ct. at 1897-1898, 1907. P & M could reasonably have believed that Alabama law was a least as generous as the Louisiana statute with respect to this post-seizure remedy.

12/ Given our disposition of the case, we need not address P & M's arguments regarding waiver, res judicata and respondeat superior. It is just as well that we need not address the res judicata issue. The record regarding Jones' and Citizens Bank's state court proceedings is confusing and apparently incomplete. While Citizens Bank appealed the denial

of its motion to dissolve the attachments, it is not clear whether Jones took an appeal when his motion was denied. Sometime after Jones' motion was denied, the Supreme Court of Alabama issued an opinion in the Citizens Bank case, and, as noted above, see supra n. 5, the record indicates that there was a close relationship between the bank and Jones in the state proceedings. Thus, it is unclear which issues were litigated and resolved on behalf of which party in the various Alabama courts. We would certainly be hard put to accurately assess the res judicata issues given this record.

Jones also claims that an employee of P & M attampted to "rig" the judicial sale which was ultimately held after P & M obtained a default judgment against Jones. This claim, however, suffers from a fatal flaw. Lugar clearly states that a private party may be liable under section 1983 only if he acts in concert with state officials or acts pursuant to, or under color of, state law. 457 U.S. at 937, 102 S.Ct. at 2753. Jones fails to allege collusion with any state official overseeing the sale and does not assert that the P & M employee who allegedly rigged the sale was acting under color of state law. Thus, the district court properly dismissed this claim.

13/ This section reads:

> § 6-6-43. by whom issued.
> In the first and second cases mentioned in section 6-4-41 [where a defendant lives out of

> state or absconds] an attachment may be issued by any judge of the circuit court, returnable to any county in the state, or by the clerk of the circuit court, judge of probate or any district court judge, within their respective counties; in the third and fourth cases, only by a judge of the circuit court or judge of probate, returnable to any county.

14/ Under Alabama code § 6-6-143 a judge must permit the plaintiff to amend any defect of form or substance in an affidavit, bond, or attachment. However, we have not discovered any Alabama law which indicates that the reviewing court must allow a questionable writ to go forward. Thus, we conclude that Alabama law does not suffer from the same flaw which rendered the Georgia attachment statute unconstitutional in Johnson. In Georgia, a judge, magistrate, justice of the peace, or clerk of any court of record, when presented with a creditor's affidavit and bond, had the "duty" to issue an attachment against the defendant. Johnson, 581 F.2d at 534. We find nothing in Alabama law to indicate that the issuing officer's discretion is so limited.

15/ Jones also intimates that the Alabama statute is unconstitutional because it allows seizure without a showing that the property to be seized is in imminent danger of destruction. However, in Mitchell, the Louisiana statute which was approved as constitutional did not re-

quire that the party seeking the writ make such a showing. All that statute required was that it be "within the power" of the defendant to dissipate or move the assets sought to be seized. 416 U.S. at 623, 94 S.Ct. at 1907. Proof of imminent dissipation does not appear to be a constitutional prerequisite for attachment.

1/ Jones filed suit against P & M, Edward Mauldin (both individual capacity and in his capacity as executor of Leonard Preuit's estate), and Leonard Preuit Mauldin. Edward Mauldin is a partner of P & M, as was Leonard Preuit. Leonard Preuit Mauldin is an employee of P & M.

2/ In Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), the Supreme Court held that private actors who invoked a presumptively valid attachment statute were "state actors" liable to suit under section 1983. In Lugar, the official who authorized the writ of attachment was the clerk of the court, not a judge exercising independent judicial discretion. Where, as in Lugar, the issuance of the writ of attachment is a purely ministerial exercise, the private party invoking the procedure effectively steps into the shoes of the state. Such is not the case when issuance of the writ is the result of an exercise of independent judicial discretion. To hold otherwise would be to hold that any time a private party invokes the judicial process to settle a private dispute, that party is potentially liable under section 1983 for any

error that the presiding judge may commit. Surely neither the framers of the Constitution nor the drafters of section 1983 intended to create that kind of disincentive to the use of judicial processes.

3/ Section 1983 provides that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

(Emphasis added).

4/ See supra note 1.

5/ Applying the common law analogy, causation would run to the defendants only if the attorney played a purely ministerial, i.e., passive, role in conducting the litigation. The undisputed facts of this case show that P & M's attorney clearly did not play that kind of role.

6/ The result I propose is consistent with our precedent regarding respondent superior liability in section 1983 cases. It is accepted doctrine that one cannot be held liable under section 1983 on a respondent superior basis. See Polk Country v. Dodson, 454 U.S. 312, 325, 102 S.Ct. 445, 453, 70 L.Ed.2d 509 (1981); Rogers v. Evans, 792 F.2d 1052, 1058 (11th Cir. 1986). The defendant here merely informed the attorney that they desired to collect on the debt owed by that they desired to collect on the debt owed by Jones, and left it to the attorney to use his expertise in deciding how best to go about achieving that end.

Even if the defendants had specifically told the attorney to apply for the writs of attachment, I would still conclude that they could not be deemed to have caused the injury Jones allegedly suffered. The attorney, on whose expertise a layperson justifiably relies, is ultimately responsible for the particular legal path employed to achieve the client's stated goals. Cf. Model Rules of Professional Conduct Rules 2.1 (1983) (in representing client, lawyer shall exercise independent professional judgment); id. Rule 1.2(d) (lawyer shall not counsel client to engage in illegal conduct).

7/ In his dissenting opinion, Judge Johnson states that the Supreme Court in Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), rejected the argument that I have put forth in this section. Post at 1347 n. 9

(Johnson, J., dissenting). Judge Johnson misstates my argument to the extent he depicts me as saying that a private party who invokes a defective attachment procedure can never be deemed to cause constitutional injury. This is not what I have said at all -- that position is obviously foreclosed by Lugar. My argument is that the private party's reliance on an attorney in invoking the attachment procedure can, in some cases, break the causal link between the private party's actions and the constitutional injury.

To the extent Judge Johnson is addressing the argument I have actually made, I fail to see the basis for his statement that the Lugar Court implicitly rejected that argument. The only explanation Judge Johnson gives for his statement is a reference to Justice Powell's dissenting opinion in Lugar. It is true that Justice Powell mentions that the private party in Lugar had proceeded through an attorney in invoking the attachment procedure. Lugar, 457 U.S. at 946, 102 S.Ct. at 2758 (Powell, J., dissenting). However, I see no suggestion in either Justice Powell's dissenting opinion or in Justice White's majority opinion that the district court in that case, like the district court here, made a finding as to precisely what role the attorney played. As I have indicated, my analysis would not apply where the attorney played a passive or purely ministerial role. See supra note 5. It may very well be that the attorney in Lugar played such a role; the point is that we simply do not know. Since the Lugar majority does not mention the issue, even

tangentially, we must assume that the parties did not raise it. Surely we cannot be foreclosed by Lugar from considering an issue that was not before the Court.

Contrary to Judge Johnson's suggestion, the Lugar Court did not hold that traditional section 1983 notions of causation are inapplicable in the case where a private party may be deemed a "state actor" for purposes of section 1983 liability is essentially a statement about causation. See Lugar, 457 U.S. at 937, 102 S.Ct. at 2754 (one may be a state actor "because he is a state official, because he acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State"). The issue I address in this opinion is an issue that the Supreme Court simply did not address in Lugar: under what circumstances may this causal relationship be broken? As I have stated, see supra note 6, I believe that my resolution of this issue on the facts of this case is wholly consistent with our precedent and the Supreme Court's precedent regarding causation analysis in the section 1983 context.

8/ See supra note 2 and accompanying text.

9/ See supra note 5 and accompanying text.

10/ Otherwise, we would be asking whether merely eliciting the aid of an attorney violates an adversary's constitutional rights. I hardly think that it does.

11/ The recognition of absolute immunity for the President of the United States may be viewed as an exception to this general observation. See Nixon v. Fitzgerald, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982) (relying heavily on separation of powers analysis).

12/ The existence of this general power is illustrated by the wide range of nonstatutory remedies that have been recognized over the years as means for redressing violation of the Constitution by state and federal officials. See, e.g., United States v. Lee, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882) (ejectment action against federal officials to enforce fifth amendment takings clause); Wiley v. Sinkler, 179 U.S. 58, 64-65, 21 S.Ct. 17, 20, 45 L.Ed. 84 (1900) (damages action against state official for denying plaintiff's right to vote in federal election); Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) (injunctive relief against state official for violation of fourteenth amendment); Weeks v. United States, 232 U.S. 383, 398, 34 S.Ct. 341, 346, 58 L.Ed. 652 (1914) (exclusion in federal criminal case of evidence seized in violation of fourth amendment); Jacobs v. United States, 290 U.S. 13, 16, 54 S.Ct. 26, 27,

78 L.Ed. 142 (1933) (damages action under fifth amendment takings clause); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15-16, 91 S.Ct. 1267, 1275-76, 28 L.Ed.2d 554 (1971) (busing as remedy for unconstitutional segregation in public schools).

13/ The Supreme Court has held that a variety of state officials are immune from damages under section 1983. See Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951) (absolute immunity for judges and qualified immunity for police officers); Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (qualified immunity for state governor, president of state university, and officers and members of state National Guard); Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975) (qualified immunity for local school administrators and school board members); O'Connor v. Donaldson, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975) (qualified immunity for superintendent of state hospital); Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) (absolute immunity for prosecutors); Briscoe v. LaHue, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983) (absolute immunity for witnesses); cf. Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) (no immunity for municipality based on the good faith of its officers); Tower v. Glover, 467 U.S. 914, 104 S.Ct. 2820, 81 L.Ed.2d 758 (1984) (no immunity for

state public defenders from liability for intentional misconduct).

14/ It is noteworthy in this regard that the immunities recognized in Bivens cases are coextensive with the immunities recognized in section 1983 cases. See Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978).

15/ In some cases, the Supreme Court does seem to be strongly embracing a restrictive approach based on the fiction that section 1983 incorporates common law immunities existing in 1871. See, e.g., Tower v. Glover, 467 U.S. 914, 920-23, 104 S.Ct. 2820, 2825-26, 81 L.Ed.2d 758 (1984). In fact, the Court frequently repeats the statement that the question of immunities is "one essentially of statutory construction." Wood v. Strickland, 420 U.S. 308, 316, 95 S.Ct. 992, 998, 43 L.Ed.2d 214 (1975). However, even in cases where the Court finds no common law antecedent existing in 1871, it goes on to inquire whether post-1871 common law cases embrace the immunity at issue. See Tower, 467 U.S. at 922, 104 S.Ct. at 2825 (finding no 1871 precedent for holding public defenders immune for intentional misconduct, but then discussing whether any modern common law jurisdiction has embraced such an immunity). In Imber v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), the Court recognized absolute immunity for state prosecutors, even though the "first American case" to address the general

issue of prosecutorial immunity to suit was an Indiana case decided in 1896. See id. 421, 96 S.Ct. at 990. The Court acknowledged that "in general our cases have followed a 'functional' approach to immunity law." Harlow v. Fitzgerald, 457 U.S. 800, 810, 102 S.Ct. 2727, 2734, 73 L.Ed.2d 396 (1982); see also Wood, 420 U.S. at 318, 95 S.Ct. at 999 ("strong public-policy reasons," as well as common law tradition, support according a qualified immunity to public school administrators). If immunity law is strictly statutory in the sense that it derives from section 1983, how do we explain the Supreme Court's holding, see supra note 14, that Bivens immunities and section 1983 immunities are coextensive?

16/ In discussing general principles of damages under section 1983, the Supreme Court in Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978), observed that

> over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injures caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiring under § 1983 as well.

Id. at 257-58, 98 S.Ct. at 1049. In a footnote to this passage, the Court noted that it "has looked to the common law of

torts in a similar fashion in constructing immunities under § 1983." Id. at 258 n. 13, 98 S.Ct. at 1049 n. 13. Consistent with the notion that the common law provides the "appropriate starting point" with respect to immunities, the Court has been unwilling to recognize a given immunity where it can identify no common law antecedent. See, e.g., Tower v. Glover, 467 U.S. 914, 104 S.Ct. 2820, 81 L.Ed.2d 758 (1984).

17/ Cf. Anderson v. Creighton, __ U.S. __, 107 S.Ct. 3034, 3041, 97 L.Ed.2d 523 (1987) ("Although it is true that we have observed that our determinations as to the scope of official immunity are made in the light of the 'common law tradition,' we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law.") (citation omitted).

18/ See supra note 12 and accompanying text.

1/ See, e.g., Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) (six opinions); Burch v. Apalachee Community Mental Health Serv. Inc., 840 F.2d 797 (11th Cir. 1988) (in banc) (six opinions); Gilmere v. City of Atlanta, 774 F.2d 1495 (11th Cir. 1985) (in banc) (six opinions), cert. denied, 476 U.S. 1124, 106 S.Ct. 1993, 90 L.Ed.2d 654 (1986).

2/ The only theory of liability ruled out by the Supreme Court in Monell was respondeat superior. Monell, 436 U.S. at 691-92 & n. 57, 98 S.Ct. at 2036 & n. 57. As later cases quickly showed, however, the Supreme Court's choice of "official policy" as the alternative to respondeat superior offered "no simple solution to the problem of delineating what is the municipality's responsibility and what is the individual employee's." Witman, 85 Mich. L. Rev. 225, 244 (1986).

3/ The Supreme Court subsequently reversed this holding in Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 663, 88 L.Ed.2d 662 (1986). Thus the doctrine introduced in Parratt and extended to intentional deprivations of property in Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 3204, 82 L.Ed.2d 393 (1984), would no longer apply to Parratt.

4/ The delicate balance between federal and state sovereignty would break down if litigants claiming deprivations by a governmental entity were confined to whatever redress the entity chose to provide, and were barred from an independent determination of their federal rights by a federal forum. The states would become the ultimate arbiters of the availability and scope of federal rights; a result at odds with the post-Reconstruction federalist order. Bandes, supra, at 115 (footnotes omitted).

5/ The Supreme Court has indicated that Parratt applies to section 1983 cases involving the Just Compensation Clause of the fifth amendment. See Williamson County Regional Planning Comm'n v. Hamiltong Bank of Johnson City, 473 U.S. 172, 195, 105 S.Ct. 3108, 3121, 87 L.Ed.2d 126 (1985).

6/ At least three justices in Lugar agreed with the proposition that good faith immunity for private individuals under section 1983 is a positive suggestion. See Lugar, 457 U.S. at 956 n. 14, 102 S.Ct. at 2763 n. 14 (Powell, J., dissenting).

7/ The plurality opinion states:

> In the same way that we wish to encourage citizens to undertake public service, so must we encourage them to settle their differences and assert their claimed rights through the employment of legal mechanisms which they believe, in good faith, are constitutional.

This kind of statement belongs on the floor of Congress, not in a judicial opinion. As Judge Johnson points out, the Supreme Court has prohibited precisely this kind of judicial policymaking under section 1983. See ante at 1343 & n. 5 (Johnson, Circuit Judge, dissenting).

8/ One possibility is to move away from trying to define constitutional wrongs as

a "particularly egregious subcategory of torts," and instead analyze section 1983 in terms of "the special problems created by the massing of power in institutions." Whitman, supra note 2, at 275. Several justices have hinted at this approach: "A deprivation must contain some element of abuse of governmental power, for the 'touchstone of due process is protection of the individual against arbitrary action of government.'" Davidson, 106 S.Ct. at 673 (Blackburn, J., dissenting) (quoting Woff v. McDonnell, 418 U.S. 539, 558, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974)).

1/ Subsequent references to P & M are intended to apply to the other private defendants as well.

2/ Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3/ Legislators and judges are entitled to absolute immunity in a Section 1983 action. See Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951) (legislators); Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) (judges).

4/ The majority also argues that private defendants should not be expected to greater liability than public defendants. However, the Supreme Court rejected this argument in other contexts. For example, in Dennis v. Sparks, the Court held that a private defendant who had conspired with a judge was not entitled to immunity from damages under Section 1983 even though the co-conspirator judge was immune. 449 U.S. at 31-32, 101 S.Ct. at 188.

5/ Although Tower involved the question of immunity from intentional misconduct, it is instructive of the Supreme Court's approach to immunity problems. In Tower, the Court rejected policy arguments offered to justify an extension of immunity to public defenders employed by a state and county. The public defenders had argued that they were entitled to immunity because the threat of Section 1983 liability would deter public defenders from performing vital aspects of their jobs, and ultimately the state's duty to furnish criminal defendants with effective counsel would be impaired. The petitioners also predicted that the federal courts would be inundated with frivolous

lawsuits. The Supreme Court responded, "Petitioners' concerns may be well founded, but the remedy petitioners urge is not for us to adopt." 467 U.S. at 922, 104 S.Ct. at 2826. A similar conclusion is required in the present case because qualified immunity for private actors is not a remedy that this Court may create.

6/ I disagree with the majority's suggestion that providing citizens with the qualified immunity is supported by the general development of Section 1983 law. The majority contends that prior to Lugar, the Supreme Court did not recognize that private defendants could be "state actors"; therefore, there was no need to discuss the immunity of these private actors. The implication of this statement is that qualified immunity for private actors is a natural development proceeding from Lugar. This position ignores the fact that the Supreme Court attachment cases, which were decided prior to Lugar, all implicitly held that a private creditor's invocation of an attachment statute was state action. Otherwise, the Court never would have reached the due process question at issue in those cases. See North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974); Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); Sniadach v. Family Finance Corporation of Bay View, 395 U.S. 337, 89 S.Ct. 1820, 23

L.Ed.2d 349 (1969). In fact, in Fuentes, the judgment ran against both the creditor and state officials. Although Fuentes involved only declaratory and injunctive relief, nothing in Fuentes suggested that the outcome would have been different if the debtor had asked for damages. See also Adickes v. S.H. Kress & Co., 398 U.S. 144-150-52, 90 S.Ct. 1598, 1604-06, 26 L.Ed.2d 142 (1970) (private party's joint participation with state official in a conspiracy constituted state action allowing damages under Section 1983). Lugar does not mandate the extension of qualified immunity merely because it explicitly stated that private actors were proper defendants in a Section 1983 action. This Court must still examine the policies behind the qualified immunity doctrine.

7/ In an unpublished opinion issued six months prior to the attachment by P & M, the Alabama attachment statute had been declared unconstitutional. Wiggins v. Roberts, No. 75-M-1760 (N.D. Ala. Aug. 31, 1978) (unpublished). In that case, the district judge stated that the unconstitutionality of the statute was obvious. Subsequent to the seizure of in this case, the Wiggins ruling was incorporated into an opinion concerning an application for attorneys' fees. Wiggings v. Roberts, 551 F. Supp. 57 (N.D. Ala. 1982). In the second Wiggins opinion, a different district court judge noted that the first judge had found the Alabama statute clearly unconstitutional in light of Di-Chem, Mitchell, Fuentes,

and Sniadach. Interestingly, the second Wiggins opinion was authorized by the same district judge who ruled in this case that the unconstitutionality of the Alabama statute was not settled.

8/ P & M's action to enforce its mechanic's lien did not constitute either an action in detinue or an action to enforce a security interest. Therefore, P & M could not have proceeded under Rule 64(b).

9/ I also observe that Judge Jjoflat's special occurrence would affirm the district court on the ground that P & M did not cause the injury suffered by Jones. Judge Jjoflat essentially argues that the unlawful attachment procedure, not P & M, deprived Jones of due process. A similar argument was presented in dissent in Lugar, 457 U.S. at 946-47, 102 S.Ct. at 2758-59 (Powell, J., dissenting). In his Lugar dissent, Justice Powell stated that a Section 1983 plaintiff had to demonstrate that the alleged unconstiutional deprivation was "caused" by a person acting under color of law. While the Lugar dissent focused on the state action issue, the causation injury was implicated as well. Justice Powell remarked that the state court clerk and the state sheriff had actually sequestered the property pursuant to the state attachment procedure (thereby causing the deprivation of property), but he emphasized that the debtor had not sued the state officials. Implicit in this discussion was

the argument that the state officials, not the creditor, had actually caused the harm to the debtor. However, this contention did not prevail in Lugar, and Judge Tjoflat's analogous argument cannot prevail here.

Judge Tjoflat states that I have mistakenly concluded that Lugar eliminates the necessity of conducting a causation analysis. However, I do not contend that Lugar rejected traditional notions of causation in a Section 1983 action. Rather, I rely on Lugar for the proposition that a creditor who invokes a faulty state attachment procedure causes the unconstitutioanl deprivation. This is the principle of causation that controls the case at bar.

In Lugar, the creditor was represented by counsel who invoked the state attachment procedure on the creditor's behalf. Neither the actions of the state officials, nor the fact that the creditor was represented by an attorney, broke the causal link between the creditor's invocation of the attachment procedure and the seizing of the debtor's property. Nonetheless, Judge Tjoflat argues that P & M did not cause Jones' injury because it hired an attorney to handle the collection of the debt, and it was allegedly unaware that the attorney would invoke the state attachment procedure. The first problem with this argument is that, even assuming that P & M's attorney acted without any direction, guidance, or assistance from P & M, Judge Tjoflat's argument is simply another version of the causation argument that did not prevail in Lugar. Lugar forecloses this argument

because an attorney's actions on behalf of a client, just like the state officials' actions in carrying out the attachment, cannot break the chain of causation. Futhermore, as a policy matter, it makes no sensse to allow a party to insulate itself from liability by hiring an attorney to do its bidding. The attorney in this case was clearly P & M's agent and he clearly had authority to pursue P & M's expressed goals. Therefore, Judge Tjoflat's attempt to distinguish Lugar on the basis of activity of the attorney in the instant case in unavailing. The fact that an attorney, rather than the client, actually invoked the state attachment procedure, is simply irrelevant.

The second problem with Judge Tjoflat's opinion is that it rests on a questionable factual basis. Judge Tjoflat assumes that P & M had no knowlege of its attorney's actions. However, two of P & M's key management personnel, Leonard Preuit Mauldin and Sherman Crisler, were closely involved in the attachment procedure with P & M's attorney. In fact, Leonard Preuit Mauldin, the son of P & M's general partner, Edward Mauldin, submitted to the state court signed affidavits for attachment of each of Jones' cotton pickers. Because Crisler and Preuit Mauldin had full authority to conduct the business of the partnership, they were, in effect, policy-makers of the partnership. Therefore, P & M is liable for their actions. Cf. Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S.Ct. 1292, 1298-99, 89 L.Ed.2d 452 (1986) (municipal liability attaches

where policy-making individual directs action complained of); Bohen v. City of East Chicago, Ind., 799 F.2d 1180, 1189 (7th Cir. 1986) (single act of high-ranking policy-maker is sufficient to establish official policy for which municipality may be held liable). Judge Tjoflat errs by failing to recognize this and by failing to recognize the ramifications of Lugar.

* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable J. Smith Henley, Senior U.S. Circuit Judge for the Eleventh Circuit, sitting by designation.